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APPENDIX

# Supreme Court of the United States

OCTOBER TERM, ~~1970~~ 1971

No. ~~5161~~ 69-5035

FRANK JOHNSON,

*Appellant,*

—v.—

LOUISIANA

APPEAL FROM THE SUPREME COURT OF LOUISIANA

FILED APRIL 20, 1970
JURISDICTION NOTED NOVEMBER 9, 1970

# Supreme Court of the United States

OCTOBER TERM, 1970

## No. 5161

FRANK JOHNSON,

*Appellant,*

—v.—

LOUISIANA

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APPEAL FROM THE SUPREME COURT OF LOUISIANA

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# MINUTE ENTRIES IN CHRONOLOGICAL ORDER

No. 202-984

STATE OF LOUISIANA

*vs.*

FRANK JOHNSON

INFORMATION FOR VIOL. R.S. 14-64

* * * *

New Orleans, Louisiana, Wednesday, March 13, 1968.

* * * *

Richard Buckley filed with the Court a Motion to Quash and a Motion to support the Motion to Quash.

---

New Orleans, Louisiana, Monday, March 18, 1968.

* * * *

The defendant appeared at the Bar of the Court accompanied by his counsel, R. Buckley, Esq. The Court then ruled that the State's answers to the Bill of Particulars were good and sufficient in law. The Court ruled also that the State's answers to the Prayer for Oyer were good and sufficient in law. The Court then heard the Motion to Quash and the Motion to Suppress. Frank Johnson then took the witness stand and was cross-examined by the State. Lt. T. Fields was called to the witness stand and was cross-examined by the defense. This matter was then recessed as an open matter until April 1, 1968.

---

New Orleans, Louisiana, Monday, April 1, 1968.

* * * *

The defendant appeared at the Bar of the Court accompanied by his counsel, R. Buckley, Esq. Byron Legendre was then called to the witness stand and was cross-examined by the defense. The Court then informed Mr. Buckley that the Court would go into the Motion to Quash. Frank Johnson then took the witness stand and was cross-examined by the State. The State then moved for a continuance before ruling in this matter, to which the defense objected. Objection was over-ruled and Mr. Buckley reserved a Bill of Exception.

---

New Orleans, Louisiana, Thursday, May 2, 1968

* * * *

The defendant appeared at the Bar of the Court accompanied by his counsel, Robert Buckley, Esq. This motion had been continued from April 1, 1968. Judge Bernard J. Bagert was then called to the witness stand and testified that what the State had previously marked S-1, the Magistrate Court minutes of Monday, January 22, 1968. The witness was then cross-examined by the defense. Mr. Oliver J. Donahue was called to the witness stand and identified that what the State had previously marked S-1 and S-2, a Magistrate Court form. The witness was then cross examined by the defense. The State then was cross-examined by the defense. The State then attempted to offer S-1 and S-2 into evidence. There was no objection by the defense. The Court ordered the exhibits marked and filed. Both State and defense was then informed by the Court to file memorandums by May 8, 1968, of which the ruling will be made on May 9, 1968.

---

New Orleans, Louisiana, May 9, 1968.

* * * *

The Court this day denied the Motion to Quash and the Motion to Suppress and Mr. Amadee, Esq. reserved 2 Bills of Exception. The defendant was then re-arraigned and entered a plea of not guilty.

---

New Orleans, Louisiana, Wednesday, May 15, 1968.

* * * *

* * * Jury returned at 2:28 P.M. Verdict of Jury: Guilty as charged. Jury was then polled and answered "yes" this was their verdict, 9 to 3. Sentencing was deferred until May 27, 1968.

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

No. 202-984 Section "G"

STATE OF LOUISIANA

*versus*

FRANK JOHNSON

MOTION TO SUPPRESS EVIDENCE—Filed March 5, 1968

Now into Court comes FRANK JOHNSON, made defendant in the above numbered cause, through his attorney of record, RICHARD A. BUCKLEY, and on showing to the Court that certain evidence was seized in the City of New Orleans, which evidence forms the basis of the charge against him the above numbered cause, and on further showing to the Court that said evidence was seized by the New Orleans Police Department without benefit of an arrest warrant or search warrant or, the alternative, without benefit of a valid search warrant; that as a result of this illegal activity of the New Orleans Police Department, said evidence is not admissible, it is moved that the Honorable District Attorney for the Parish of Orleans, show cause on the day and date to be set by this Court why this evidence in the above numbered cause should not be suppressed.

/s/ RICHARD A. BUCKLEY

RICHARD A. BUCKLEY
New Orleans Legal Assistance Corp.
605 Carondelet Building
New Orleans, La. 70130
Attorney for Defendant

## ORDER

Considering the foregoing motion to suppress evidence, in Case No. 202-984, assigned to this Section of the Court, it is ordered that the District Attorney for the Parish of Orleans, show cause on the ..... day of ....., 1968, why this evidence should not be suppressed.

_____

Judge

5/9/68

Denied

/s/ FRANK J. SHEA,
Judge, Section G

CRIMINAL DISTRICT COURT

PARISH OF ORLEANS

No. 202-984, Section "G"

STATE OF LOUISIANA

*vs.*

FRANK JOHNSON

ANSWER TO MOTION TO SUPPRESS THE EVIDENCE—
Filed March 6, 1968

Now into this Honorable Court through the undersigned Assistant District Attorney comes the State of Louisiana and in answer to the defendant's Motion to Suppress the Evidence does state as follows:

I.

Any and all evidence in the possession of the State which it seeks to use against the defendant in this case was seized incidental to the use of all substantial and procedural safeguards to which the defendant is entitled under the laws of the Constitution of the United States and the State of Louisiana.

WHEREFORE, the State prays that after due proceedings had the Motion to Suppress the Evidence filed by the defendant herein be denied.

/s/ CHARLES C. FOTI, JR.
CHARLES C. FOTI, JR.
Assistant District Attorney
Section "G"

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS

No. 202-984, Section "G"

STATE OF LOUISIANA

*vs.*

FRANK JOHNSON

MOTION TO QUASH—Filed March 13, 1968

And now into this Honorable Court comes Frank Johnson, defendant herein, through undersigned counsel, and having heard the information read, and protesting that he is not guilty of the offense set out therein, moves to quash the said information, for the following reasons, to-wit:

1. That defendant was arrested on January 20, 1968 for an alleged offense of armed robbery. Defendant, being indigent, could not afford bail nor an attorney; and no official court appointment of an attorney for defendant was made until February 21, 1968—32 days after arrest. Defendant concedes that unusual circumstances enabled the undersigned attorney to begin representing defendant on February 10, 1968, but even this was 21 days after arrest. Defendant contends that this substantial delay from arrest to appointment of counsel impaired defendant's right to effective counsel in that it has caused a serious difficulty in the adequate preparation of his defense. Defendant contends that this procedure was prejudicial because the first few days subsequent to arrest are more critical for investigation and preparation of pretrial proceedings. Defendant is charged with armed robbery, the most serious non-capital felony in Louisiana, and required representation by an attorney as soon as possible after arrest, and particularly before the committing magistrate. The reason for representation at this most critical period is to protect the defendant's right to participate effectively in the fact-finding process of trial.

2. The information is defective in that the facts upon which defendant is charged was obtained either:

(a) illegally and/or;

(b) through misrepresentation and therefore defendant contends that his arrest and the search of his home and person were illegal and lacked the constitutional requirement of probable cause.

On January 20, 1968 at 5:30 a.m. Frank Johnson was forcibly arrested without a warrant in his residence by one or more of an eight man raiding squad for an alleged violation of R.S. 14:64. The New Orleans Police Department Form #153 (copy attached) indicates that Frank Johnson was notified of the reason approximately 1 hour and 40 minutes after his arrest at defendant's residence. Defendant was booked for a violation of R.S. 14:64 at 9:40 a.m. on the same day. The booking occurred 2½ hours after the police informally defendant of his arrest. During this interval of 2½ hours, defendant did not have an attorney nor did he waive his right to have an attorney present to render advice and assistance. Not only was defendant intensively interrogated during this interval of 2½ hours, but the police also transported him back to the vicinity of his residence to search for incriminating evidence.

The arrest book at the Central Lock-up (maintained pursuant to R.S. 15:228) reflects that the alleged offense was committed on January 15, 1968—five days preceding the forcible arrest and subsequent search of the defendant conducted by the police without a warrant. The arrest book also shows that the alleged basis for the arrest of Frank Johnson was that subject's photo was picked out of a "mug" book as one of the hold-up men. On January 20, 1968 defendant was subsequently booked with two additional violations of R.S. 14:64.

WHEREFORE, the said Frank Johnson prays that this Motion to Quash be maintained and that the said information as to him, and as far as he is concerned, be declared null and void, and that he be discharged therefrom.

_____

Defendant

/s/ RICHARD A. BUCKLEY
RICHARD A. BUCKLEY
605 Carondelet Building
New Orleans, Louisiana 70130
Telephone 523-1297
Attorney for Defendant

[*Duly sworn to by Richard A. Buckley jurat omitted in printing (all in italics)*]

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

No. 202-984 Section "G"

STATE OF LOUISIANA

*versus*

FRANK JOHNSON

AMENDMENT TO MOTION TO SUPPRESS THE EVIDENCE—
Filed March 20, 1968

As directed by the Court at the hearing on the Motion to Suppress Evidence, March 18, 1968, the defendant, FRANK JOHNSON, through his attorney, amends his previously submitted Motion to Suppress to read as follows:

Now into this Honorable Court comes FRANK JOHNSON, defendant herein, through his undersigned counsel, and protests that he has had his constitutional rights violated as are guaranteed by the Constitutions of the United States and the State of Louisiana, in that evidence, including the pistol allegedly used by the defendant, to be used against the defendant herein has been unlawfully and illegally obtained, and that the defendant moves that this evidence be suppressed in any criminal proceeding against him for the following reasons, to-wit:

1. The evidence to be used against the defendant was not seized incidental to a valid arrest and/or search.

WHEREFORE, the defendant Frank Johnson prays that this Motion to Suppress the evidence be maintained and that the evidence sought to be used by the State of Louisiana, including any confessions or oral admissions, in this matter, or any related proceeding, be ordered suppressed in its entirety by this Honorable Court, and

that the State of Louisiana, through its authorized representative, be prohibited from making reference thereto during the trial of this matter.

/s/ RICHARD A. BUCKLEY
RICHARD A. BUCKLEY
605 Carondelet Building
New Orleans, Louisiana 70130
Telephone 523-1297
Attorney for Defendant

5/9/68

Denied

/s/ FRANK J. SHEA
Judge, Sec. G

ORDER

Let Jim Garrison, District Attorney for the Parish of Orleans, be and he is hereby ordered to show cause on the ..... day of March, 1968 why the Motion to Suppress the Evidence should not be maintained and that the evidence sought to be used be excluded and declared inadmissible by the State as the basis of its criminal prosecution.

Judge, Section "G"
Criminal District Court
Parish of Orleans

New Orleans, Louisiana

March ....., 1968.

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS

No. 202-984, Section "G"

STATE OF LOUISIANA

*vs.*

FRANK JOHNSON

ANSWER TO MOTION TO QUASH—Filed May 2, 1968

Now into Court through the undersigned Assistant District Attorney comes the State of Louisiana and for answer to the defendant's Motion to Quash anaswers as follows:

I.

The State denies each and every allegation contained in Paragraphs I, II, iiA, and IIB of the defendant's Motion to Quash and calls for strict proof thereof.

WHEREFORE, the State prays that after due proceedings had the defendant's Motion to Quash be denied.

/s/ CHARLES C. FOTI, JR.
CHARLES C. FOTI, JR.
Assistant District Attorney

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS

Number 202-984, Section "G"

STATE OF LOUISIANA

*versus*

FRANK JOHNSON

SUPPLEMENTAL AND AMENDED MOTION
IN ARREST OF JUDGMENT—

And now, after verdict against the said Frank Johnson and before sentence, comes the said Frank Johnson, through undersigned counsel, and moves the Court hear this supplemental and amended motion in arrest of judgment herein and not to pronounce the sentence herein because of manifest errors in the record of Frank Johnson, to-wit:

1. The defendant reiterates all of the allegations in the original motion in arrest of judgment as if incorporated herein.d

2. That the verdict of the jury, a 12 man jury was 9 for guilty and 3 for not guilty; that under the Constitution and laws of the United States of America, specifically the 6th and 7th Amendments, as incorporated in the due process of law clause of the 14th Amendment to the United States Constitution, this is illegal because a unanimous verdict of 12 is required.

WHEREFORE, your mover prays that after due proceedings had, his conviction be set aside.

EARL J. AMEDEE
Counsel for Defendant

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS

No. 202-984 Section "G"

STATE OF LOUISIANA

*vs.*

FRANK JOHNSON

BILL OF EXCEPTIONS NO. 3—Filed September 9, 1968

BE IT REMEMBERED, that before entering on the trial of this case, your defendant, by his counsel filed the following Motion to Suppress Evidence on March 5, 1968.

| | | |
|---|---|---|
| "State of Louisiana | : | Criminal District Court |
| | : | Parish of Orleans |
| *vs.* | : | State of Louisiana |
| Frank Johnson | : | No. 202-984 Section "G" |

MOTION TO SUPPRESS EVIDENCE

NOW INTO COURT comes Frank Johnson, made defendant in the above numbered cause, through his attorney of record, Richard A. Buckley, and on showing to the Court that certain evidence was seized in the City of New Orleans, which evidence forms the basis of the charge against him in the above numbered cause, and on further showing to the Court that said evidence was seized by the New Orleans Police Department without benefit of an arrest warrant or search warrant or, the alternative, without benefit of a search warrant; that as a result of this illegal activity of the New Orleans Police Department, said evidence is not admissible, it is moved that the Honorable District Attorney for the Parish of Orleans, show cause on the day and date to be set

by this Court why this evidence in the above numbered cause should not be suppressed.

/s/ RICHARD A. BUCKLEY
RICHARD A. BUCKLEY
Attorney for Defendant
New Orleans Legal Assistance Corp.
605 Carondelet Building
New Orleans, Louisiana 70130
523-1297

ORDER

Considering the foregoing motion to suppress evidence, in Case No. 202-984, assigned to this Section of the Court, it is ordered that the District Attorney for the Parish of Orleans, show cause on the day of , 1968, why this evidence should not be suppressed.

Judge"

That on a subsequent date of the Court on May 9, 1968, a hearing was had contradictorily with the State on the said *Motion to Suppress Evidence.*

The Court denied and overruled the *Motion to Suppress Evidence,* to which action your defendant then and there objected and reserved a Bill of Exceptions, making a part of the Bill of Exceptions, the information, the Motion to Suppress Evidence, and the entire record a part thereof and your defendant now perfects a formal Bill of Exceptions making a part of the same, the *Information,* the *Motion to Suppress Evidence,* the ruling of the Court, objection of counsel and the entire record, and first sub-

mitting the formal Bill of Exceptions to the District Attorney now tenders the same to the Court for its comment and per curiam and prays that the same be signed and sealed by the judge of this Court, pursuant to the statute in such case made and provided, which is done accordingly this 14th day of April, 1969.

/s/ FRANK J. SHEA
Judge

Unsigned

---

Attorney for Defendant

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

Number 202 984

STATE OF LOUISIANA

*vs.*

FRANK T. JOHNSON

PER CURIAM TO BILL OF EXCEPTION NO. 3

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF LOUISIANA

MAY IT PLEASE THE COURT:

Bill of Exception No. 3 was taken to my overruling of a Motion to Suppress filed by the defendant alleging that certain evidence was seized from the defendant which forms the basis of the charge against nim. A lengthy hearing was had on the Motion to Suppress at which hearing it developed that no evidence relative to the case for which the defendant is now on trial was seized.

Additionally, the transcript will show that no evidence was offered during the trial by the State except for a photograph of the show-up at which the defendant was identified. However, the testimony on the Motion to Suppress disclosed that Officer Field, on the 18th of January, 1968, received information from a confidential informant, through his superior, Captain Newman, that the defendant, Frank Johnson, and another man were involved in an armed robbery of several truck drivers. The officer further testified that he obtained a photograph of Frank Johnson from the B of I, along with a picture of the other man mentioned by the informant, and placed them in a group and had them brought to one of the victims who was employed by Brown's Velvet Dairy. One of the victims looked through the group of pictures and identified Frank Johnson and also a photograph of the other man.

He initialed the same with the date and stated positively that Frank Johnson was the person who had held him up. This information in their possession, the officers went to the home of the defendant where they arrested him after being admitted to his house by his wife. They found the defendant under the bed and placed him under arrest.

However, since no evidence was offered in the trial, I believe, that the question of the Motion to Suppress is moot insofar as any evidence is concerned. Insofar as the arrest is concerned, I think that the officers had probable cause to arrest the defendant since (1) they had knowledge of several armed robberys that had been committed against truck drivers for Brown's Velvet Dairy (2) they had positive identification by one of the victims, of the defendant, Frank Johnson, as the person who had held him up. As such, the officers had probable cause to believe that Frank Johnson committed the robbery and the right to arrest him. Beyond that, there is nothing before this Court in the way of evidence which could formulate the basis for this Bill of Exceptions.

Respectfully submitted,

/s/ Frank J. Shea
FRANK J. SHEA
Judge, Section G

New Orleans, Louisiana
Dated this 14 day of April, 1969

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS

No. 202-984 Section "G"

STATE OF LOUISIANA

*vs.*

FRANK JOHNSON

BILL OF EXCEPTION NO. 5—Filed September 9, 1968

BE IT REMEMBERED, that before entering on the trial of this case, the defendant, by his counsel, filed the following *Motion to Quash*:

| | | |
|---|---|---|
| "State of Louisiana | : | Criminal District Court |
| *vs.* | : | Parish of Orleans |
| Frank Johnson | : | No. 202-984, Section "G" |

MOTION TO QUASH

AND NOW INTO THIS HONORABLE COURT comes Frank Johnson, defendant herein, through undersigned counsel, and having heard the information read, and protesting that he is not guilty of the offense set out therein, moves to quash the said information, for the following reasons, to-wit:

1. That defendant was arrested on January 20, 1968, for an alleged offense of armed robbery. Defendant, being indigent, could not afford bail nor an attorney; and no official Court appoint of an attorney for defendant was made until February 21, 1968 —32 days after arrest. Defendant concedes that unusual circumstances enabled the undersigned attorney to begin representing defendant on February 10, 1968, but even this was 21 days after arrest. Defendant contends that this substantial delay from arrest to appointment of counsel impaired defend-

ant's right to effective counsel in that it has caused a serious difficulty in the adequate preparation of his defense. Defendant contends that this procedure was prejudicial because the first few days subsequent to arrest are most critical for investigation and preparation of pre-trial proceedings. Defendant is charged with armed robbery, the most serious non-capital felony in Louisiana, a required representation by an attorney as soon as possible after arrest, and particularly before the committing magistrate. The reason for representation at this most critical period is to protect the defendant's right to participate effectively in the fact-finding process of trial.

2. The information is defective in that the facts upon which defendant is charged was obtained either:

(a) illegally and/or,

(b) through misrepresentation and therefore defendant contends that his arrest and the search of his home and person were illegal and lacked the constitutional requirement of probable cause.

On January 20, 1968 at 5:30 A.M. Frank Johnson was forcibly arrested without a warrant in his residence by one or more of an eight man raiding squad for an alleged violation of R.S. 14:64. The New Orleans Police Department Form #153 (copy attached) indicates that Frank Johnson was notified of the reason approximately 1 hour and 40 minutes after his arrest at defendant's residence. Defendant was booked for a violation of R.S. 14:64 at 9:00 A.M. on the same day. The booking occurred 2½ hours after the police informed defendant of his arrest. During this interval of 2½ hours, defendant did not have an attorney nor did he waive his right to have an attorney present to render advice and assistance. Not only was defendant intensively interrogated during this interval of 2½ hours, but the police also transported him back to the vicinity of his residence. of his residence to search for incriminating evidence.

The arrest book at the Central Lock-up (maintained pursuant to R.S. 15:228) reflects that the

alleged offense was committed on January 15, 1968 —five days preceding the forcible arrest and subsequent search of the defendant conducted by the police without a warrant. The arrest book also shows that the alleged basis for the arrest of Frank Johnson was the subject's photo was picked out of a "mug" book as one of the hold-up men. On January 20, 1968 defendant was subsequently booked with two additional violations of R.S. 14:64.

WHEREFORE, the said Frank Johnson prays that this Motion to Quash be maintained and that the said information as to him, and as far as he is concerned, be declared null and void, and that he be discharged therefrom:

_____

Defendant

/s/ RICHARD A. BUCKLEY
RICHARD A. BUCKLEY
Attorney for Defendant
605 Carondelet Building
New Orleans, Louisiana
522-1297

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared RICHARD A. BUCKLEY, who, after being by me duly sworn, did depose and state:

That he is the attorney for defendant, Frank Johnson, that he has read the foregoing Motion to Quash and that all of the allegations contained there-

in are true and correct, to the best of his information knowledge and belief.

/s/ RICHARD A. BUCKLEY
RICHARD A. BUCKLEY

Sworn to and subscribed before
me this 12th day of March, 1968.

/s/ JOHN S. SUTHERLIN, JR.
Notary Public"

That on a subsequent date of the Court, a hearing was had contradictorily with the State on the said *Motion to Quash.* That the Court overruled and denied said Motion to Quash to which ruling your defendant then and there reserved a Bill of Exceptions, making a part of the Bill of Exceptions, the information, the Motion to Quash, the ruling of the Court, the objection of counsel and the entire record a part thereof and defendant, Frank Johnson, now perfects this formal Bill of Exceptions and having submitted it to the District Attorney, now tenders the same to the Court for its comment and per curiam and prays that the same be signed and sealed by the Judge of this Court, pursuant to the statute in such case made and provided which is done accordingly this 14th day of April, 1969.

/s/ FRANK J. SHEA
Judge

/s/ EARL J. AMEDEE
Attorney for Defendant

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

Number 202 984

STATE OF LOUISIANA

*vs.*

FRANK T. JOHNSON

PER CURIAM TO BILL OF EXCEPTION NO. 5

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF LOUISIANA

MAY IT PLEASE THE COURT:

Bill of Exception No. 5 was taken to my overruling of the only Motion to Quash filed by the defendant, which complains that the delay in time between the arrest of the defendant and the appointment of an attorney for the defendant impaired the defendant's right to effective counsel. This Motion goes on to make statements of fact which are not substantiated by the credible evidence and testimony adduced on both the pleadings and on the trial of this case. The defendant, while being arrested without a warrant, was not "forcibly" arrested in the sense intimated by counsel but, as stated heretofore, by the officers after being admitted to the house by the defendant's wife.

Defense counsel further states that the defendant was not notified of the reason for his arrest until one hour and forty minutes after his arrest. This is contradicted by all of the credible evidence in the case in that the officers testified that upon finding the defendant, they placed him under arrest, informed him that he was under arrest for the crime of armed robbery and immediately advised him of all of his constitutional rights, both under the State of Louisiana and the Constitution of the United States, and under the Miranda decision. At this time all of his rights were ennumerated to him.

The Motion goes on to attack the method of arrest without a warrant. As I stated previously in other Per Curiams, I believe that the police had probable cause to make the arrest of the defendant, who was identified as someone who had robbed another person while armed with a dangerous weapon. I think it was reasonable for them to effect the arrest of this defendant as soon as possible and I do not think that the law required that they obtain a warrant since they did have probable cause as stated before to arrest this defendant for the commission of a forcible felony.

In the Motion counsel also makes an erroneous allegation of fact in that he said, "no official court appointed an attorney for the defendant until February 21, 1968." The record of this case and of your Honorable Court in proceedings No. 49 102 belies this fact since it shows, first that on February 20, 1968, this Court unanimously denied a Petition filed by the defendant through his present counsel for Writ of Mandamus and Habeas Corpus. The record further shows that as early as February 10th the same counsel who makes this allegation filed a Writ of Habeas Corpus which was alloted to the section of Judge Thomas Brahney and heard by him. This again belies the statement of counsel that the defendant had no adequate representation before February 21, 1968.

The record further shows that on January 22, 1968, the defendant appeared before the Honorable Bernard J. Bagert, Judge of Section H of the criminal district court, who was at that time sitting as committing magistrate. Testimony taken on the Motion to Quash by Judge Bagert indicates that he advised the defendant of all of his rights and also advised him that if he did not have counsel, that counsel would be appointed to represent him.

The testimony of both Judge Bagert and his Minute Clerk indicates that the defendant waived the right to a preliminary hearing. However, since counsel was representing the defendant on February 10, 1968, and the Bill of Information was not filed in this case until February 14, 1968, some seven days before ultimate counsel was appointed, counsel knew that under the law the defendant had an absolute right to a preliminary hearing

at that time and it was incumbent upon him in the representation of his client, if he thought it was necessary, to request a preliminary hearing at which time testimony could have been perpetuated.

He could not be dilatory in this respect and then complain to the Court that the defendant's rights were violated since any delay in the ascertaining of evidence or testimony to aid in his defense was occasioned by him and not by any Court.

Further, as the Court will see in a later Bill, there was a supplemental Motion to Suppress filed with respect to an oral confession made by the defendant. On that Motion it was testified that the defendant was advised of his rights on two occasions: first, at the time of his arrest and, secondly, in the detective bureau, and that the defendant was not beaten, threatened or made any promises by any officers at any time from the time of his arrest until the time that he was booked and placed in Central-Lockup.

However, again this question becomes moot since no statement alleged to have been made by the defendant was ever offered in evidence by the State. For this reason, I overruled the Motion to Quash.

Respectfully submitted,

/s/ Frank J. Shea
FRANK J. SHEA
Judge, Section G

New Orleans, Louisiana

Dated this 14th day of April, 1969.

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS

No. 202-984 Section "G"

STATE OF LOUISIANA

*vs.*

FRANK JOHNSON

BILL OF EXCEPTIONS NO. 7—Filed September 9, 1968

BE IT REMEMBERED, that before entering on the trial of this case, your defendant, by his counsel filed the following Amendment to Motion to Suppress Evidence:

| | | |
|---|---|---|
| "State of Louisiana | : | Criminal District Court |
| | : | Parish of Orleans |
| *vs.* | : | State of Louisiana |
| Frank Johnson | : | No. 202-984 Section "G" |

AMENDMENT TO MOTION TO
SUPPRESS THE EVIDENCE

As directed by the Court at the hearing on the Motion to Suppress Evidence, March 18, 1968, the defendant, Frank Johnson, through his attorney amends his previously submitted Motion to Suppress to read as follows:

NOW INTO THIS HONORABLE COURT comes Frank Johnson, the defendant herein, through his undersigned counsel and protests that he has had his constitutional rights violated as are guaranteed by the Constitutions of the United States and the State of Louisiana, in that evidence, including the pistol allegedly used by the defendant, to be used again the defendant herein has been unlawfully and illegally obtained, and that the defendant moves that this evidence be suppressed in any criminal proceeding against him for the following reasons, to-wit:

1. The evidence to be used against the defendant was not seized incidental to a valid arrest and/or search.

WHEREFORE, the defendant, Frank Johnson, prays that this Motion to Suppress the Evidence be maintained and that the evidence sought to be used by the State of Louisiana, including any confessions or oral admissions, in this matter, or any related proceeding, be ordered suppressed in its entirety by this Honorable Court, and that the State of Louisiana, through its authorized representative, be prohibited from making reference thereto during the trial of this matter.

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RICHARD A. BUCKLEY
Attorney for Defendant
605 Carondelet Building
New Orleans, Louisiana 70130
523-1297

ORDER

Let Jim Garrison, District Attorney for the Parish of Orleans, be and he is hereby ordered to show cause on the day of March, 1968 why the Motion to Suppress the Evidence should not be maintained and that the evidence sought to be used be excluded and declared inadmissible by the State as the basis of its criminal prosecution.

---

Judge, Section "G"
Criminal District Court
Parish of Orleans

New Orleans, Louisiana

March , 1968."

That on a subsequent date of the Court on May 9, 1968, a hearing was had contradictorily with the State on the said *Amendment to Motion to Suppress Evidence.*

The Court denied and overruled the *Amendment to Motion* to Suppress Evidence, to which action your defendant then and there objected and reserved a Bill of Exceptions, making a part of the Bill of Exceptions, the information, Motion to Suppress Evidence, and the Amendment to the Motion to Suppress Evidence and the entire record a part thereof and your defendant now perfects a formal Bill of Exceptions making a part of the same the Information, the Motion to Suppress Evidence and the Amendment to Motion to Suppress Evidence, the ruling of the Court, objection of counsel and the entire record, and first submitting the formal Bill of Exceptions to the District Attorney, now tenders the same to the Court for its comment and per curiam and prays that the same be signed and sealed by the Judge of this Court, pursuant to the statute in such case made and provided, which is done accordingly this 14th day of April, 1969.

/s/ FRANK J. SHEA
Judge

Unsigned

Attorney for Defendant

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

No. 202 984

STATE OF LOUISIANA

*vs.*

FRANK T. JOHNSON

PER CURIAM TO BILL OF EXCEPTION NO. 7

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF LOUISIANA

MAY IT PLEASE THE COURT:

Bill of Exception No. 7 was taken to an amended motion to suppress the evidence on the ground that the evidence was not seized incidental to a valid arrest or search, and further objected to any statements made by the defendant being introduced in evidence. For the reasons assigned in the previous Per Curiam, I felt that the State had met the test of both the free and voluntary nature of the statement as well as the test that the defendant's rights had been adequately protected under the State and Federal constitutions and under the Miranda decision and that he had been adequately warned of all of his rights.

However, again this question appears to be moot since the State offered no statement made by the defendant at any time during the trial of this case.

Respectfully submitted,

/s/ FRANK J. SHEA
FRANK J. SHEA
Judge, Section G

New Orleans, Louisiana

Dated this 14th day of April, 1969.

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS

No. 202-984 Section "G"

STATE OF LOUISIANA

*vs.*

FRANK JOHNSON

BILL OF EXCEPTIONS No. 24—Filed September 9, 1968

BE IT REMEMBERED, that on a day subsequent to the trial of this matter, and before sentence, defendant, Frank Johnson, through his undersigned counsel, filed the following Motion in Arrest of Judgment and Supplemental and Amended Motion in Arrest of Judgment:

* * * *

| | | |
|---|---|---|
| "State of Louisiana | : | Criminal District Court |
| *vs.* | : | Parish of Orleans |
| Frank Johnson | : | No. 202-984 Section "G" |

SUPPLEMENTAL AND AMENDED MOTION IN ARREST OF JUDGMENT

AND NOW, after verdict against the said Frank Johnson and before sentence, comes the said Frank Johnson, through undersigned counsel, and moves the Court hear this Supplemental and Amended Motion In Arrest of Judgment herein and not to pronounce the sentence herein because of manifest errors in the record of Frank Johnson, to-wit:

1. The defendant reiterates all of the allegations in the original Motion in Arrest of Judgment as if incorporated herein.

2. That the verdict of the jury, a 12-man jury, was 9 for guilty and 3 for not guilty; that under the constitution and laws of the United States of

America, specifically the 6th and 7th Amendments, as incorporated in the due process of law clause of the 14th Amendment to the United States Constitution, this is illegal because a unanimous verdict of 12 is required.

WHEREFORE, your mover prays that after due proceedings had, his conviction be set aside.

EARL J. AMEDEE
Counsel for Defendant

ORDER

Let the District Attorney for the Parish of Orleans be and he is hereby ordered to show cause on the day of , 1968, why this Supplemental and Amended Motion in Arrest of Judgment should not be granted.

Judge

New Orleans, Louisiana
, 1968."

And after said Motion in *Arrest of Judgment* and said *Supplemental and Amended Motion in Arrest of Judgment* were filed and after hearing argument by counsel for the State and the defense, the Court denied the Motions to which ruling, counsel for the defendant, Frank Johnson, objected in open Court and reserved a formal Bill of Exceptions, making a part thereof the entire record of the case, the Motion in Arrest of Judgment, the Supplemental and Amended Motion in Arrest of Judg-

ment, the ruling of the Court denying said Motions and objection of defense counsel a part thereof.

And first submitting this his formal Bill of Exceptions to the District Attorney, defendant, Frank Johnson, now tenders the same to the Court for its comments and per curiam and prays that the same be signed and sealed by the Judge of this Court, pursuant to the statute in such case made and provided, which is done accordingly, this 14th day of April, 1969.

/s/ FRANK J. SHEA
Judge

/s/ EARL J. AMEDEE
Attorney for Defendant

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

No. 202 984

STATE OF LOUISIANA

*vs.*

FRANK T. JOHNSON

PER CURIAM TO BILL OF EXCEPTION NO. 24

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF LOUISIANA

MAY IT PLEASE THE COURT:

Bill of Exception No. 24 was taken to the denial of the Motion in Arrest of Judgment and supplemental Motion in Arrest of Judgment.

Paragraph one of the motion merely reiterates all that was raised on the Motion to Quash with respect to the right of counsel at all stages of the proceedings. Althought this has been previously covered in another per curiam, I feel that the defendant's rights were adequately protected from the time of his arrest until the time of his appearance in court for arraignment. Since there was no evidence offered which was alleged to have been seized from the defendant and since there was no inculpatory statement or admission offered in evidence alleging to have been made by the defendant, the most critical state of the proceeding against this defendant was that of the Show-up. The evidence produced on the Motion to Suppress and by a witness called by the defense, Mr. Byron Legendre, is uncontradicted and established conclusively that at the time that the defendant was identified at the Show-up, he was represented by most competent counsel with several years experience as chief counsel for the Legal Aid Bureau and whose testi-

mony established that the Show-up conducted by the police department was fair and conducted under the guide lines and decisions of both this Honorable Court and the Supreme Court of the United States.

There has been no showing or offer of any testimony to show how the defendant was prejudiced in the preparation of his defense in this case.

Paragraph 2 makes reference to exculpatory statements. Again, this is redundant and moot since no such statements were offered in evidence

Paragraph 3 merely is a legal prayer by counsel for the defendant for me to overturn the verdict of the jury whom, I believe, were justified in returning a verdict of guilty as charged against the defendant since, in my opinion, the State had proved the defendant's guilt beyond a reasonable doubt.

Respectfully submitted,

/s/ Frank J. Shea
FRANK J. SHEA
Judge, Section G

New Orleans, Louisiana

Dated this 14 day of April, 1969.

IN AND FOR THE CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

No. 202-984

STATE OF LOUISIANA

*vs.*

FRANK JOHNSON

Testimony and evidence adduced during the hearing on the motion to Quash and motion to suppress evidence in the above entitled cause on Monday, March 18, 1968, before the HONORABLE FRANK J. SHEA.

APPEARANCES:

CHARLES C. FOTI, JR., ESQ.
State of Louisiana

RICHARD A. BUCKLEY
Attorney for Defendant

REPORTED BY:

EDWARD B. SMITH
Official Court Reporter

* * * *

[fol. 3] FRANK T. JOHNSON, after having been first duly sworn, did testify as follows:

DIRECT EXAMINATION

BY MR. BUCKLEY:

Q Would you please state your name for the record?
A Frank Thomas Johnson.
Q And on the morning of January 20th, 1968, where were you residing?
A 2135 Philip Street.
Q And is that in the city of New Orleans?
A Yes, sir.

Q Would you explain to the Court what happened on the morning of January 20th, 1968, approximately five A.M. on that morning?

A Well, it was a lot of knocking on the door and I got up and I went to the door and I opened the door and they said, "This is the police." And so I let them in.

So at the time my wife got up because my nephew and my youngest son were crying in the third room, so the police officers came in and they asked me, they said—

Q May I interrupt you a minute, Mr. Johnson: Did you yourself go to the door or did someone else in the house go to the door?

[fol. 4] A No, there was a friend of mine there. He opened the door.

Q What is his name?

A Harold Hayes.

Q He opened the door?

A Yes, sir.

Q Approximately what time of the morning was this?

A I'd say about 5 o'clock.

Q 5 A.M.

A Yes, sir.

Q What were you doing at the time that you heard this knock on the door?

A Well, I was sleeping.

Q You were asleep?

A Yes, sir. And I heard it.

Q Were all of the occupants in your home asleep at that house?

A Yes.

BY MR. FOTI:

I am going to ask that he refrain from leading the witness.

BY THE COURT:

Proceed.

EXAMINATION BY MR. BUCKLEY:

Q Mr. Johnson, at any time after the police entered [fol. 5] your home, were you—by the way, how many police officers did you see enter your home that morning?

A I'd say about eight.
Q Eight police officers?
A Yes, sir.
Q Were they uniformed or not uniformed?
A No, they weren't uniformed. They were in detective clothes, you know, plain clothes men.
Q At any time after they entered, did they show you an arrest warrant?
A No, sir.
Q Did at any time after they entered, did they show you a search warrant?
A No, sir.
Q What was the first thing they did to you?

BY MR. FOTI:

Your Honor, I am going to have to ask that he refrain from leading his witness. Now, this is his witness; he is testifying.

BY THE COURT:

I know, but how else are we going to find out if he doesn't ask him what the police did?

BY THE WITNESS:

Well, they came in and they brought a picture.
[fol. 6] Q May I interrupt you again: Were they armed?
A Yes, sir; they were armed.
Q With what type of weapons?
A Shotguns.
Q Did they have shotguns pointed at anyone?
A Yes, sir, they had them pointed at me.
Q Did they at any time handcuff you?
A Yes, sir; they handcuffed me.

BY THE COURT:

I think you are getting into possibly an irrelevant area. We have to determine whether his arrest was legal and the subsequent questioning or any seizure of evidence was incidental or a follow-up of this arrest. Let's just try to confine it.

BY MR. BUCKLEY:

I was just trying to lay the ground also for any statements that might have been made and under what conditions they were made.

BY THE COURT:

All right. Go ahead.

EXAMINATION BY MR. BUCKLEY:

Q At the time they handcuffed you, did they tell you what they were doing in your home?

A Well, they asked me—no, they didn't say what [fol. 7] they were doing there.

Q Did they conduct a search of your home?

A Yes, sir, they did.

Q And in what areas did they search of your home?

A Well, they went in the first room and turned the mattress up on the bed and into the second room and that is when they woke my wife up and the kids started crying and they went into the third room, which was the room where two smaller kids were and my oldest son. And my oldest son was sleeping in the front room. He is about eighteen months old. And they all woke up and started crying.

Q Did the officer ask you any questions?

A Yes, sir.

Q What was the first question the officer asked you?

A After he handcuffed me, he showed me a picture and asked me if that was my picture.

Q What type of picture was this?

A It was a photo of me; I guess, it was about four years old and wearing an Ivy League haircut at the time.

And so I told him, "Yes, that was me." And he said, [fol. 8] "What is your name?" And I told him again, "Frank Johnson." So after handcuffing me, he asked me, he said, "Where is the pistol?" And I said, "Pistol?" and I said, "What pistol?" And he looked at me and that is when they began to search.

Q And at what point did the officer inform you that you were under arrest: Was it before or after the search?

A After the search.

Q Did he indicate specifically what you were being arrested for?

A Yes, sir, after that.

Q Did he tell you?

A After they made the search and he made my wife put my clothes on me.

Q Did the officer tell you what specific charge you were going to be charged with?

A Yes, sir.

Q And what was that?

A He said that, "You are under arrest for armed robbery."

Q Is that all: He didn't specify what date this armed robbery occurred or anything?

A No, not there.

[fol. 9] Q After the officers finished there search and had arrested you, did they take you from your home?

A Yes, sir.

Q Where did they proceed with you?

A They proceeded with me over to this court house building and the Detective Bureau of Armed Robbery.

Q This court house right here?

A Yes, sir.

Q About what time was this?

A I'd say it was a quarter to six.

Q Had they at that time informed you of your rights pertaining to counsel, rights that you did not have to say anything?

A No, sir.

Q What occurred while you were in the Detective Bureau on the morning of January 20th, 1968: Did they question you?

A Yes, sir; they questioned me concerning this supposed armed robbery that I allegedly committed and they questioned me at length about various other individuals whose pictures they brought to me to see, and I told them [fol. 10] I didn't know anything about any of that.

Q Did the officers that were questioning you—by the way, do you know the name of the officer who was questioning you? Was it Detective Lanza (phonetically spelled)?

A Yes, it was one of them.
Q Did the officer threaten you at all?
A Yes, sir; not verbally.
Q How did the officer threaten you?
A With their fists. They punched me a few times and then they got a board.

BY THE COURT:

Before we get to all of this, I think we better establish whether or not we have a statement because if he made no statement, all of this is irrelevant insofar as the motion to suppress is concerned, except insofar as any physically evidence.

BY MR. BUCKLEY:

No, I want to carry this through chronologically because there are other points that I want to show that any evidence they secured is inadmissible from the time of the initial forcible entry into his home, his arrest, the time the brought him to the Detective Bureau, out of the De- [fol. 11] tective Bureau back into the streets again, back to the Detective Bureau and finally four hours later, booked over at central lockup.

BY THE COURT:

Finish from where you said the police hit you.

BY THE WITNESS:

So that is when they—they stopped and they took me back downstairs again and said that they was going to pick up Harold Hayes. So they asked me do I know him.

EXAMINATION BY MR. BUCKLEY:

Q Did they ask you if you knew Harold Hayes?
A Yes, sir.

BY THE COURT:

Isn't Harold Hayes the man that answered the front door?

BY THE WITNESS:

Yes, sir, he is.

EXAMINATION BY MR. BUCKLEY:

Q How did they find out that that was Harold Hayes?
A Through a picture that two other detectives had.
Q Were these the pictures that they were displaying to you, showing to you?
A Yes, sir.
Q What was their remarks at that time?
[fol. 12] A When they saw the picture of Harold Hayes? Well, let's see, I don't think I could quote them word for word but they said something to the effect, "Isn't that the one that claims he was your brother?" And I said, "I don't know if he claims he was my brother," but that is Harold Hayes.
Q And after your questioning was finished, where did the officers take you then?

BY MR. FOTI:

Your Honor, at this time the State is going to have to ask that: He is alleging in his motion one that there was evidence picked up. This man has never said any statement that anything has been picked up.

BY THE COURT:

No, he is not going forward now. As far as I know, they left the Detective Bureau. Where did they go from there?

BY THE WITNESS:

We went back to my house to see if Hayes was there and he wasn't. They went in and they ran all through the back and around the corner and, you know, in the vicinity to see if he was there figuring that he might have [fol. 13] run or something, but he wasn't there. They just knocked on the door and went in. My old lady opened the door and they just ran through the house.
Q Did they ever take anything from your home to your knowledge?

A Yes, sir: A box of my brother's. It was on the mantel piece with some things of his.

Q It was on the mantel piece. What types of box was this?

A It was a baby shoe box for my baby boy, like what his shoes was in. It was in that.

Q Did he give your wife a receipt for this?

A No, sir.

Q Did they give you a receipt for this?

A No, sir.

BY THE COURT:

What was in the box?

BY THE WITNESS:

A syringe, hose syringe and a needle. We had been using it for gonorrhea.

BY THE COURT:

All right. Go ahead Mr. Buckley.

EXAMINATION BY MR. BUCKLEY:

Q After they returned to your home the second time, [fol. 14] where did they take you next?

A Well, they took me, they went around and was taking me to Harold Hayes's house, but we stopped at Melpomene and Simon Bolivar and we stopped for the light. When the light turned green, we crossed and at that point they observed—I didn't know if it was him—but they observed a male walking reading a paper, but he had the paper up over his face, you know. So they pulled, they was driving yet, and then they passed him.

Well, they was on the downtown side of Melpomene and the individual was on the uptown side of Melpomene. So they passed him up and they relayed back to a car behind that there was a male coming towards them that looked like the individual they were looking for, supposedly, to be Harold Hayes. So at that point we made a big turn and came back out Melpomene.

Q Did they ever ask you whether that man that they were now after was Harold Hayes?

A No, sir.

Q Did any of the officers ask you that?

[fol. 15] A No, sir. Well, I couldn't see his face because the paper was in front of his face.

Q And did they finally get back to that man?

A Yes, sir.

Q Did they ask you then whether that man was Harold Hayes?

A Yes, sir.

Q Did you tell them?

A Yes, sir; I told them yes. He told them his name was Harold Hayes because they questioned him by the time we got back down there.

Q Did you see them search Harold Hayes?

A No, I didn't see them search him.

Q At that time after they had picked up Harold Hayes, did they return now to the Detective Bureau?

A Yes, sir.

Q Could you tell the Court what happened upon your return to the Detective Bureau?

A Well, they took him to a room and I sat out in the front.

Q Did they question you any further?

A No, they didn't question me any further.

Q Did they then come in to ask you if you wanted to [fol. 16] make any statements?

A Yes, sir. About twenty, twenty-five minutes later they came into me and they read off of a piece of paper something to the fact pertaining to the fact that they advised me of my rights, and I told them I didn't want to make any statements; I didn't have anything to say.

Q Did you sign such a piece of paper, an arrestee form, or anything like that?

A Yes, I signed the form that they had, notified me of my rights as an arrestee.

Q Did you sign any other statement?

A No, sir.

Q This was approximately 7 A.M. in the morning?

A Yes.

Q When they informed you of your rights?
A About seven, 7:05 A.M.
Q What occurred between 7 A.M. and the time they finally booked you at central lockup at 9:40 A. M. that morning?
A Well, they left with Hayes and—

BY THE COURT:

Unless he made a statement, it is really irrelevant.

[fol. 17] BY MR. BUCKLEY:

I want to show, your Honor, why they are not proceeding under our statutes or under our code.

BY THE COURT:

Unless he made a statement, what right was he deprived of by the slow booking?

BY MR. BUCKLEY:

The right to be promptly booked. I consider them still using him as an investigative tool to find evidence against him.

BY THE COURT:

Unless he was telling them where to find him I don't know what kind of a tool he was for them.

EXAMINATION BY MR. BUCKLEY:

Q What happened at the Detective Bureau after that?
A Well, they left with Hayes and it was approximately —I could only approximate—I couldn't definitely state so I don't think I'd say exactly when but they come back with Hayes and I think he had his arm wrapped up or something, and at that time they got us both together and they brought us over to central lockup and booked us with armed robbery.
Q Did they subsequently book you again that same [fol. 18] day?
A Yes, sir; about four and a half, about five hours later on that evening they came back. They came up-

stairs and brought us back downstairs and they rebooked us with another armed robbery, and about fifteen minutes later, maybe ten, they rebooked us with another armed robbery.

Q Did you subsequently appear before a committing magistrate on January 22nd, Monday?

A Yes, sir.

Q At that time did you have an attorney assigned to you?

A No, sir.

Q At that time did the Court explain to you the rights to have a preliminary examination?

A No, sir; they just set my bond. He set the bond at $50,000.00 on each charge.

BY THE COURT:

You mean he didn't inform you of your rights that you had a right to a lawyer and you didn't have to say anything and that you could have a preliminary hearing?

BY THE WITNESS:

The only thing he said was: He asked me, "Did I [fol. 19] have a lawyer?" And I told him, "No." He asked me: "Did I think I could afford one?" And I said I didn't want one.

BY THE COURT:

All right. Proceed.

EXAMINATION BY MR. BUCKLEY:

Q But to your knowledge there was nothing said about your right to preliminary examination?

A No, sir. I thought that would be mandatory.

BY THE COURT:

Who told you that?

BY THE WITNESS:

No one.

EXAMINATION BY MR. BUCKLEY:

Q All right. To your knowledge, have you ever been booked with a robbery of Eugene Frischhertz?

A No, sir.

BY THE COURT:

When you are saying no, what do you mean: You haven't been or you don't know who you are booked with robbing?

BY THE WITNESS:

I was booked with three counts of armed robbery: [fol. 20] Two on Marion Cattalana and one on another gentlemen who worked for the same company.

Q Lester Messa (phonetically spelled)?

A Lester Messa; right, sir.

BY MR. BUCKLEY:

Your Honor, at this time I tender the witness.

BY THE COURT:

Let me ask you something so we understand one another: You never did tell these police anything about any admission or anything about taking part in any of these robberies; you never did say anything to implicate yourself in either of these three robberies that you just told us about, or robbing anybody?

BY THE WITNESS:

A No, sir.

BY THE COURT:

During the whole time from the time the police arrested you at your house until this moment?

BY THE WITNESS:

No, sir.

BY THE COURT:

You never have admitted anything about any robbery or admitted taking part in any robbery or admitted hav-

[fol. 21] ing any of the loot from any robbery; you never made any statement about anything like that?

BY THE WITNESS:

No, sir.

BY THE COURT:

Then there is no statement to suppress.

BY MR. BUCKLEY:

Your Honor, I don't know whether—could I approach the Bench?

BY THE COURT:

Take your witness on cross examination

CROSS EXAMINATION

BY MR. FOTI:

Q What day was it that the police arrested you?
A Twentieth of January, 1968.
Q And approximately what time?
A I'd say about five twenty, five twenty-five.
Q What were you doing when they came in?
A I was just getting up off of the bed.
Q And then what did the officers do?
A They asked me if—they was questioning the other individual, Hayes, at that time.
Q Did they ask you if your name was Frank Johnson?
A Yes, sir; they did.
[fol. 22] Q And then they told you you were under arrest?
A No, sir. They asked me to, showed me a photo and asked me was that my photo. I took the photo from them and I told them, "Yes," that it was.
Q And they then told you you were under arrest?
A Well, no; they put the handcuffs on me.
Q What did you say when they put the handcuffs on you?
A I asked them what was this.

Q And what did the officers say?
A They said, "Where is the pistol at?"
Q What else did you say after that?
A I asked them what pistol.
Q And what did the officers say?
A Two of the other officers turned the mattress over in the front.
Q Well, the officers never answered your question?
A No, sir; they didn't.
Q They never advised you that you were under arrest for armed robbery?
A No, sir.
Q They just handcuffed you?
A Yes, sir.
Q Did they read your rights?
[fol. 23] A No, sir.
Q Did you make any statements?
A No, sir.
Q You made no statements at your house?
A No, sir.
Q You made no statements at the Detective Bureau?
A No, sir.
Q Did you make any statements the second time you went to the Detective Bureau?
A No, sir.
Q Did you make statements in the police car?
A No, sir.
Q Did you make statements in central lockup?
A No, sir.
Q At no time did you make a statement?
A At no time did I make any statements.

BY THE COURT:

Did they ever take a gun from your house or from your person?

BY THE WITNESS:

No, sir.

BY THE COURT:

Or in your presence find a gun?

BY THE WITNESS:

No, sir.

[fol. 24] EXAMINATION BY MR. FOTI:

Q Did you ever go to a lineup?
A Yes, sir.
Q What day was this?
A Tuesday. Saturday was the twenty second; I think it was the twenty-third. That was the twenty-third.
Q Did you have an attorney?
A Yes, sir.
Q Who was your attorney?
A I think it was Mr. Legandre.
Q From legal aid?
A Yes, sir.
Q He represented you at the lineup?
A Yes, sir.
Q Did he talk to you before the lineup?
A Yes, sir.
Q Did he advise you of your rights?
A Yes.
Q This was on the twenty-third, January 23rd, 1968?
A Yes, sir.

BY MR. FOTI:

No further questions.

BY THE COURT:

He was present at the lineup?

[fol. 25] BY THE WITNESS:

Yes, sir.

BY THE COURT:

Talked to you before the lineup and was present during the lineup?

BY THE WITNESS:

Yes, sir.

BY THE COURT:

All right. Step down next to your counsel.

BY MR. BUCKLEY:

Your Honor, at this time the defense requests the Court that we have made a showing, factual showing that there was an arrest and a search conducted without a warrant and the burden of showing the legality of this so called arrest and search is now upon the State.

BY THE COURT:

Well, I know one of the witnesses that we are probably going to have here, after this defendant's statement, is engaged in a murder trial right new: Judge Bagert, for one, or his minute clerk, or both. And we can't get them this morning, but what we can do here is hear whatever officers we have here this morning and get that much of the case over with. So call whatever officers you have [fol. 26] here that you intend to call, if any, and then we will have to recess the matter until we can get to Judge Bagert because he is trying a murder case that is going to take a couple of days.

* * * *

THEODORE FELD, after having been first duly sworn, did testify as follows:

DIRECT EXAMINATION

BY MR. FOTI:

Q State your name and occupation?

A Theodore Feld, Lieutenant, New Orleans Police Department, assigned to the Detective Bureau, Robbery Division.

Q Were you so employed in the month of January, 1968?

A Yes, sir.

Q In the latter part of January and January 20th, 1968, did you have an occasion to arrest one Frank Johnson?

A Yes, sir.
Q What did you arrest him for, Officer?
A Arrested him for armed robbery.
Q And where was he arrested from?
A From his residence on, I think, it was 2135 Philip Street.
[fol. 27] Q Was this subject advised of his rights?
A He was told, he was placed under arrest for the armed robbery and he was brought back to the detective bureau where he was read the rights of arrestee form, and he didn't quite understand it so we advised him not to sign the form.
Q Did you advise him at the time you placed him under arrest that he was arrested for armed robbery?
A Yes, sir.
Q Did he make any statement at that time?
A At that time, no.
Q He was orally advised of his rights at that time?
A Yes, sir.
Q And then he was read the rights of, he was asked to sign a paper back at the Detective Bureau?
A We advised him not to sign the paper back in the Detective Bureau.
Q And why was that?
A Because he said he didn't quite fully understand it; so we told him it would be best not to sign it.
Q Did you participate when this subject was placed before a lineup?
[fol. 28] A Yes, sir.
Q Was he represented by counsel?
A Yes, sir.
Q Who represented him?
A Mr. Byron Legendre from the legal aid.
Q Was he there throughout the entire time?
A The entire lineup; yes, sir.

BY MR. FOTI:

I tender this witness.

## CROSS EXAMINATION

BY MR. BUCKLEY:

Q Officer, you mentioned that the defendant made no statements at that time: What time?

A At the time at his house or anything, in the automobile, because we were looking for two subjects at the time and we found out later, after we brought him back to the Detective Bureau, that the subject—

Q Yes, I realize that, but all I want right now is your answer to: Did he make any statements—at what time did he make any statements—you mentioned he didn't make any at that time.

A Well, he was arrested and conveyed back to the Detective Bureau and in the Detective Bureau, after he [fol. 29] was read his rights of arrestee form, he admitted that we had him. After we told him what we had on him, he admitted his part in the armed robbery.

Q Didn't you state that he didn't understand his rights and you advised him not to sign it?

A We have a rights of arrestee form that we read to all of the subjects, and we asked him if he understood it and he was doubtful, so we advised him not to sign his rights.

Q Under your own regulations, your police department regulations, pertaining to that form, what is the procedure when an individual doesn't understand his rights and he doesn't sign it, what is the procedure incumbent upon the arresting officer?

BY MR. FOTI:

We are not talking about procedure here; we are talking about what actually happened.

BY THE COURT:

I am concerned about what he did.

EXAMINATION BY MR. BUCKLEY:

All right. The defendant didn't understand his rights. [fol. 30] You proceeded with the interrogation in any event?

A He was willing to talk to us, yes.
Q Even in the event he didn't understand his rights?
A Well, we couldn't do anymore than tell him, break it down in his language. I told him he didn't have to make a statement if he didn't want.
Q Was there an attorney present?

BY THE COURT:

Let him finish, Mr. Buckley.

BY THE WITNESS:

A And we told him at the time why we had arrested him: That his photograph was identified, and then he told us that we had him right.

BY THE COURT:

That is not what you were saying about breaking down his rights for him.

BY THE WITNESS:

Breaking it down in his language. I mean, as far as what the superintendent has the forms, he didn't understand it, so we just told him that if he didn't want to make a statement, it was up to him, but he told us that he would make a statement to us. It wasn't written though, he just made an oral statement.
[fol. 31] Q There was no attorney present?
A No, sir.
Q He was advised that he had a right to an attorney?
A Yes, sir.
Q Was he advised that if he could not afford an attorney that one would be provided him?
A That was read to him off of the rights of arrestee form.
Q Was he advised that anything he stated could be used against him in trial?
A Yes, sir.
Q And that he didn't have to make any statements?
A It is all on that form.
Q I am asking you.

BY THE COURT:

The way you explained it to him, did you tell him that also?

BY THE WITNESS:

Yes, sir. We told him that he didn't have to make a statement; if he couldn't have a lawyer, I mean, if he couldn't afford a lawyer, that the Court would appoint him a lawyer; and that we were going to put him in a lineup and we said we would give him a lawyer to represent him at the lineup.

[fol. 32] Q He didn't waive his right to have an attorney, right to make any statements, to your knowledge; did he waive any rights?

A No, he didn't waive any rights.

BY THE COURT:

Do you understand what he is talking about?

BY THE WITNESS:

About he wanted to make his statement without a lawyer present.

BY THE COURT:

That is what he wants to know: Did he waive his right to make a statement without a lawyer present?

BY THE WITNESS:

He told us that he'd make a statement, yes, without a lawyer being present.

EXAMINATION BY MR. BUCKLEY:

Q Did he sign anything to that effect?

A No, sir.

Q Do you understand what a "Waiver of" constitutes, lieutenant?

A A waiver is when he signs that he would make a statement without a lawyer being present and all, yes.

Q Do you know whether a person can waive his rights [fol. 33] if he doesn't understand his rights?

BY THE COURT:

That is up to me to decide, not him.

BY MR. BUCKLEY:

I was just asking him as a lieutenant in the New Orleans police department.

BY THE COURT:

That makes no difference.

EXAMINATION BY MR. BUCKLEY:

Q Were you in charge of this investigation, lieutenant?
A Yes, sir.
Q Did you have an arrest warrant when you proceeded to this home?
A No, sir.
Q Did you have a search warrant when you proceeded to this home?
A No, sir.
Q On what basis did you enter this man's home?
A On the eighteenth of January we received information from a confidential informant—I didn't receive it—my superior, Captain Newman received it from one of his informants that Frank Johnson and Hayes, Harold Hayes—

BY MR. BUCKLEY:

[fol. 34] Your Honor, this is—

BY THE COURT:

Well, it is a motion to suppress. Hearsay is admissible as a basis for him arriving at probable cause or reasonable grounds to believe a felony had been committed and can't tell whether he had reasonable grounds or probable cause without going into what information he was supplied with.

EXAMINATION BY MR. BUCKLEY:

Q All right. Continue, Lieutenant.
A Saying that these two subjects were involved in an armed robbery of truck drivers. So I sent one of the

men over to the B of I to get photographs on subjects by the name of Harold Hayes and Frank Johnson in a group and have one of the men bring it to one of the victims who was employed by the Brown's Velvet. The man looked at the pictures and identified Frank Johnson and also a photograph of Harold Hayes. He initialed the same with the date and then that gave us probable cause to arrest him. The man positively said that was the man that held him up.

[fol. 35] Q Do you have that photograph in your possession now?

A I don't have it on me, no.

Q Could you estimate when that photograph was taken: Is there any dates on there?

A No, the procedure in the B of I, if a man is arrested, the photographs are taken, a new photograph is taken every five years, and if a man changes in any way, any characteristics, anything, the photograph is taken. If he is finger printed and mugged today and next month he comes up there with a mustache, they will take another photograph of him. I can tell you that.

Q So this photograph could have been five years old at that time?

A Five years: It could have been only one month old. I couldn't tell you. I don't recall the date that they had on the mug shot.

Q Lieutenant, you weren't the one that actually was present when one of the victims identified this photograph, this mug shot was the individual that had robbed him?

A No, I wasn't.

Q Who did you receive that information from?

[fol. 36] A May I look at that report you have there, Mr. Foti? I sent Detective John Lanza to show the photographs.

Q Did Detective Lanza relate the information back to you that he received?

A Yes, sir: In report form to me, yes.

Q For what offense was this individual—when did that offense take place?

A This was an armed robbery.

Q When?

A That occurred in December. The man was a victim of three armed robberies. In December; I don't know the date.

Q In December.

A In December of '67'.

Q Did he identify him as to all of those robberies or just to one?

A I don't recall whether he identified him to all of them or not.

Q Is there a way you can refresh your memory as to this date? It is very important, your Honor.

BY THE COURT:

I don't see that it is important. If the man says it was in December and the man picked out the picture [fol. 37] in January, he picked out a picture of this defendant, what difference does it make whether it is December 20th or December 1st?

BY MR. BUCKLEY:

It was the alleged victim that picked out this photo. Was his name Marion Catalano?

BY THE WITNESS:

Yes, sir.

EXAMINATION BY MR. BUCKLEY:

Q Perhaps if I refresh your memory better, did he allege that he had an offense committed against him on January 15th?

A He had about three armed robberies. He was the victim of three armed robberies.

Q Another one on January 8th?

A That is probably the time. He is employed by Brown's Velvet. It happened around on Third Street, I think. Catalano was the man that identified the photographs.

Q Where did this alleged offense take place? The one that you are now going to proceed to this defendants

home to arrest him for: What offense are you going there to arrest him for?

A I was going to charge him with armed robbery and [fol. 38] I was going to come back to the robbery division to find out what item number and the date of the offense. I mean, I don't carry that around with me at all times.

Q You didn't know specifically what particular armed robbery you were going to arrest him for?

A I was going to arrest him positively for the armed robbery of Brown's Velvet Ice Cream truck driver.

Q Which one, when?

A I can't recall the date, but I have it in my locker.

Q You could have arrested him for any one of those in your locker?

A No, no I was going to go, Mr. Catalano being the complainant on this case, to arrest him because he was the one who identified his photograph.

Q Yes. Well, I don't think we are concerned here with what Mr. Catalano is going to identify; I want from you, Lieutenant, what you were going to arrest this defendant for?

BY THE COURT:

I think he has answered that.

[fol. 39] EXAMINATION BY MR. BUCKLEY:

Q This was on January 18th you received this information?

A I didn't receive the information. Captain Newman, Assistant Chief of the Detective Bureau, received the information.

Q When did you receive the information?

A I received the information from him right after he talked to his informant.

Q What date was that?

A On the eighteenth.

Q Was there some reason why you could not secure an arrest warrant for this defendant at that time?

A Well, when we received information on the eighteenth, I think it was kind of hard for us to find Mr.

Catalano because he was on his route, and we didn't exactly know where he was at but as far as the arrest warrant, no, there was no reason why we didn't get any.

Q And you were going to conduct a search while you made that arrest; Was that your intention?

A Incidental to the arrest?

Q Yes.

[fol. 40] A Yes.

Q Was there any reason why you didn't secure a search warrant?

A No.

Q What time did you proceed to 2135 Philip Street on January 20th?

A Approximately, a little after, about six fifteen, six thirty in the morning.

Q Was it daytime or nighttime?

A In the morning. It was still dark because during the winter time, it is dark at that time of the morning.

Q Were you aware that no search warrant can be executed during the nighttime in New Orleans, Louisiana?

A We have a warrant that can be executed at nighttime with the Judge's permission.

Q How did you gain entry to this home?

A Knocked on the front door. We were admitted by a colored female who identified herself as Mrs. Johnson and another colored male who identified himself. I forget the name, but he said his name was Johnson, but we knew it wasn't the subject who we were looking for at the time.

[fol. 41] Q Did you announce your authority and purpose when you knocked on the door?

A We told them we were looking for Frank Johnson and showed them our identification.

Q Did you announce your purpose?

A Yes, we told them we wanted to arrest Frank Johnson.

Q Did you tell them why?

A Yes.

Q Who are you relating this to?

A To the colored female who identified herself as Mrs. Johnson. She was holding a little baby in her arms.

Q How many individuals were involved in this arrest?
A How many police officers?
Q Correct.
A Six.
Q Were you all armed?
A Positively.
Q With shotguns?
A Yes, sir.
Q Did you enter the home with your shotguns?
A Yes, sir.
Q Did you enter the home with your shotgun?
A We sure did. Six of us didn't go in the home.

[fol. 42] BY THE COURT:

Don't be volunteering information; just answer the questions.

BY THE WITNESS:

Yes, sir.

EXAMINATION BY MR. BUCKLEY:

Q Did you personally arrest the defendant?
A You mean put my hands on him first to say he was arrested?

BY THE COURT:

Who told him he was under arrest?

BY THE WITNESS:

Sergeant Viguerie, when he took him from under that bed, told him he was under arrest.
Q You didn't?
A No, sir.
Q Did any one at that time inform him of his rights not to make any statements?
A I didn't because I was talking to his wife telling her that we were going to charge him.
Q To your knowledge, did anyone else in your investigative party?
A I couldn't recall.

Q Was there any search conducted?
A At the time, yes.
[fol. 43] Q What areas of the house were searched?
A The bedroom, the second room and the kitchen.
Q What was the objective of the search?
A We were looking for a nickel plated automatic.
Q Did you find such a nickel plated automatic?
A Not at his house, no.
Q Where did you find the nickel plated automatic—did you subsequently find, that morning, a nickel plated automatic?
A Yes.
Q Where.

BY MR. FOTI:

I am going to have to object.

BY THE COURT:

If it doesn't come from him—

BY MR. BUCKLEY:

It is going to be used against him.

BY THE COURT:

That doesn't make any difference. Objection sustained.

EXAMINATION BY MR. BUCKLEY:

Q Did you seize anything in that defendant's home?
A Yes, we seized some other stuff.
Q Did you give anyone a receipt for this?
A We seized, I am trying to think now what it was, [fol. 44] a little syringe and a spoon that was used with narcotics.
Q You didn't go there searching for it: The arrest was for armed robbery?
A It was, right on the mantel piece. We couldn't overlook it when we saw it.
Q It was in the open?
A It was laying on top of a little baby shoe box.
Q It was inside a shoe box?

A Open.
Q The top of the shoe box was open?
A Yes.

BY THE COURT:

That is really not going to play any part in this unless it has something to do with this robbery. He is not going to even testify about this if this case goes to trial.

BY MR. BUCKLEY:

I realize that, your Honor.

EXAMINATION BY MR. BUCKLEY:

Q By the way, was the defendant handcuffed?
A Yes, sir.
Q Immediately?
A When we took him from under the bed, we let him get dressed and then we handcuffed him.
[fol. 45] Q After the search, did you conduct the defendant to the police headquarters?
A Yes, sir.
Q About what time was this?
A About a half hour after we got to his house. Like I say, it was approximately, about, between six fifteen and six thirty when we got to his home. So we got back to the office, I guess, about a quarter to seven, approximately.
Q Did you participate in any interrogation of the defendant at that time?
A I think, if I am not mistaken, I might have read him his rights of arrested. My name should be on the back of that blue copy you have there.
Q Detective John Lanza and Sergeant Larry Vigurie.
A Vigurie.
Q But your name isn't on there.
A No, I didn't read him the rights form.
Q After the defendant was formally informed of his rights at 7:00 A.M., it says on this arrestee slip, to your knowledge, was he conducted anywhere else outside police headquarters?

A He was brought back up to his house because he [fol. 46] said the subject who we were looking for who claimed that he was Johnson's brother at the time was the other subject who we were looking for and he took us back to his house and showed us the other locations where this fellow, Hayes, may be living. In fact, we missed him and we were riding back to the detective bureau.

Q Did he volunteer to do this?

A He spotted the man three blocks on Melpomene and said: This is the subject walking along the street reading a newspaper in front of him, and he identified him from his walk.

Q Now, from the time after he was read his rights in the detective bureau, did he volunteer to go back out to identify the other subject?

A Yes, he told us he would find him for us.

Q Was he handcuffed at this time?

A Yes, sir; he was handcuffed. Now, this time he might have been handcuffed in front instead of being handcuffed in back of him.

Q About how long elapsed now from 7:00 A.M. and the time you went out to locate this other subject, how much time elapsed?

[fol. 47] A We went right back to his place, to his residence, because we doubted if the fellow would be at the residence yet. When we got there, he was gone.

Q Did you subsequently locate the other subject?

A We picked him up right, practically on Melpomene and Simon Bolivar.

Q You then returned to the detective bureau with both suspects?

A He returned in the car with me and Hayes returned in the car with four other detectives, because we had two cars.

Q You came back to the detective bureau?

A Yes, sir.

Q At this time there was additional interrogation made of this defendant?

A We charged him at that time, I think, with a couple of armed robberies.

Q You came back to the detective bureau, I thought you said.

Q Yes, sir.

Q He hadn't been charged yet in the detective bureau?

A We made out the arrestee forms and all back in the detective bureau.

Q Was he interrogated at any additional length upon [fol. 48] your return with the other suspect?

A Yes, he was interrogated.

Q And he didn't have an attorney?

A No, sir.

Q And he hadn't waived his rights according to your arrestee form?

A Not according—

BY MR. FOTI:

Your Honor, that is not his determination.

BY THE COURT:

That is for me to determine: Whether he waived his rights or not; not the officer's.

EXAMINATION BY MR. BUCKLEY:

Q Then the defendant was booked approximately 9:40 A.M. on January 20th?

A I don't exactly know the time. The time was about an hour or two after we got back to the office.

Q Do you know for what offense he was booked?

A We booked him with two or three, maybe four armed robberies at the time. I don't recall exactly which ones.

Q The initial booking?

A Catalano was the original booker and that is what we went out there to arrest him on.

Q You have stated that you were present in a lineup [fol. 49] held, I believe, on January 23rd?

A Yes, sir.

Q Was this defendant identified at that lineup?

A He was identified.

Q He was identified by one of the victims?

A Yes, sir.

Q By one of the victims that you went out to arrest him for?

A Well, when we had the lineup, we went through our files and got victims of all truck driver holdups in that location and requested them to come back to view the lineup. He was identified by one of those victims, and then that is when he was charged on this charge.

Q Do you know if the attorney, I think, you have previously mentioned that there was an attorney representing him?

A Yes, sir.

Q Do you know if he was representing everyone in the lineup or specifically this defendant?

A He was representing Johnson and Harold Hayes both charged with armed robbery.

Q This was Byron Legendre?

A Legal aid, yes.

BY MR. BUCKLEY:

That is all of the questions I have.

[fol. 50] REDIRECT EXAMINATION

BY MR. FOTI:

Q Were you present during the whole time he was questioned?

A I was in and out of the office. I couldn't tell you. No, I wasn't there all of the time he was being questioned.

Q During the time you were there, did anybody threaten the victim, I mean, the defendant?

A No, sir, not that I recall.

Q To make any statement?

A No, sir.

Q Was he beaten, kicked, punched, struck?

A Not in my presence.

Q Did you or anybody else tell him that if he made a confession or admission, that it would go easier on him?

A No, sir; no promises.

Q And any promises of inducements or rewards if he made any kind of admission?

A No, sir.

Q He was read his rights?

BY THE COURT:

We have been through that five or six times.

BY MR. FOTI:

No further uestions.

[fol. 51] BY THE COURT:

Step down; step outside; don't discuss your testimony with anyone. Do you have any other witnesses here at this time?

BY MR. FOTI:

No, your Honor.

BY THE COURT:

This matter is fixed for April 1st. The defendant is remanded and it will be recessed until April 1st.

(On April 1st, 1968, the following proceedings were had with regard to the above captioned matter).

* * * *

Transcript of the testimony and proceedings taken during the trial of the above captioned matter on Wednesday, May 15, 1968, before the HON. FRANK J. SHEA.

* * * *

[fol. 10] EUGENE FRISCHERTZ, having been duly sworn by the Minute Clerk was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FOTI:

Q State your name and occupation, sir?
A Eugene Frischertz, route salesman for Coca-Cola Bottling Company.
Q Were you so employed on December 26, 1967?
A I was.
MR. AMADEE: Your Honor, that is the last leading question I am going to let him get by with.

THE COURT: You better start making real objec-
[fol. 11] tions. You are talking about his interruptions. I don't want any frivolous objections here.

BY MR. FOTI:

Q Did you have an occasion on that date to be at Brown's Grocery at 2139 Third Street?
A I did.
Q Is this in the City of New Orleans?
A It is.
Q When were you there, approximately?
A Approximately three-thirty in the afternoon.
Q Would you tell the Court and the Jury what happened that day?
A Well, we had just finished making this stop at Brown's Grocery and we were getting in our truck, and we were getting ready to pull away from the curb, I saw this fellow come up, in the rear view mirror of the truck, and it looked—I didn't know his intentions at first—but as he came up to the door of the truck, he brandished this revolver and he asked for all my money.
Q How much did you give him?
A Between five and $600.00.
Q Did he then ask for anything else?
A No, he didn't.
Q This was what, the Coca-Cola money?
[fol. 12] MR. AMADEE: Object to leading, your Honor.
MR. FOTI: Who did the money belong to that he took?
THE WITNESS: He took the Coca-Cola money plus my wallet, which contained checks from the day's deliveries and my money which amounted to around $31.00.

BY MR. FOTI:

Q Do you see this person in Court today?
A I do.
Q Would you point him out, please?
A That gentleman right there (indicating).
Q Is this the same gentleman that held you up on December 26, 1967?

A It is.

Q Is this the same person you subsequently identified at a line-up?

A It is.

MR. AMADEE: Object to leading, your Honor. Let him testify.

THE COURT: The objection is sustained. Rephrase your question.

[fol. 13] BY MR. FOTI:

Q Did you attend a line-up on January 23, 0968?

A I did.

Q And at that time did you identify anyone?

A I identified that man.

MR. FOTI: At this time the State marks as S-1, a picture.

BY MR. FOTI:

Q Sir, at this time I show you an exhiibt which the State has marked S-1 and ask you if this is a picture—this represent the line-up picture that was taken on the date that you identified Frank Johnson?

A It does.

Q Can you tell me, if you can, which one of these gentlemen is Frank Johnson?

A This gentleman, Number 4 (indicating).

Q Had you ever met Frank Johnson before this day?

A I did not.

Q Had you ever seen him before?

A No, sir.

Q Would you turn over your money to him except for the gun?

A No, sir.

Q You did it involuntarily: Gave him your money against your wishes?

[fol. 14] A Right.

MR. FOTI: I tender this witness.

CROSS EXAMINATION

BY MR. AMADEE:

Q How do you pronounce your name, sir?
A Frischertz.
Q Frischertz?
A Frischertz, yes, sir.
Q Well, if I make a mistake, I am sorry because I have been trying to pronounce your name.
Now, Mr. Frischertz, going back to the date in question, what date was that that you say this happened?
A December 26, 1967.
Q December 26, 1967. And about what time did it happen?
A Three-thirty, sir, in the afternoon.
Q Who was with you: You said something about "we"?
A My two helpers were with me sitting in the truck.
Q Two helpers?
A Yes.
Q Do you know their names?
A Lionel Payton.
Q Do you know where he lives?
A I don't know offhand.
[fol. 15] Q He lives in the City of New Orleans?
A Right.
Q And you have seen him around the Court here this morning?
A Yes.
Q Is he in the witness room?
A Right.
Q And who is the other one?
A George Flagge.
Q Are these two Negroes?
A Yes, sir.
Q Well, is he out in the witness room, too?
A Yes.
Q About how old is Payton, approximately?
MR. FOTI: Your Honor, I am going to have to object because that is hearsay unless he knows from his own knowledge. Besides that, it is irrelevant.

THE COURT: Objection sustained.

MR. AMADEE: Your Honor, to the ruling of the Court on the question of the age of these two men that work with this man daily, counsel would like to reserve [fol. 16] a Bill of Exceptions making the question propounded by the defendant, the defense counsel, the objection of the State, the ruling of the Court and the entire record a part thereof.

EXAMINATION BY MR. AMADEE:

Q Now, Mr. Frischertz, you say this was around, about three-thirty p.m.?

A Yes, sir.

Q Were these two boys, your helpers, carrying anything?

A No, sir.

Q What were they doing?

A They were sitting in the truck; we were getting ready to leave the stop.

Q They were sitting in the truck and you were driving the truck?

A No, sir.

Q Who was driving?

A George Flagge.

Q Is he a driver-salesman?

A Yes, he is.

Q Do you know how long has he been one?

MR. FOTI: Your Honor, I am going to have to object to this also as it is irrelevant.

[fol. 17] THE COURT: Objection sustained.

MR. AMADEE: To the ruling of the Court, counsel would like to reserve a Bill making the question, objection and the ruling of the Court and the entire record a part thereof.

BY MR. AMADEE:

Q Now, where were you seated in the truck?

A I was sitting on the passenger side.

Q You got three of you all in the front seat?

A Yes, sir.

Q And you were nearest—
A Nearest the door.
Q What door?
A To the passenger door.
Q Which direction were you travelling in relation to the River?
A Heading toward the River.
Q That would mean that you were sitting nearest to the right door?
A Right?
Q I mean, you are calling it the passenger door, but I'd prefer calling it the right door?
A Right.
Q And George was driving?
[fol. 18] A Right.
Q And who was in the middle?
A Lionel Payton.
Q Payton was in the middle. You said something about a rear-view mirror, didn't you?
A Yes, sir.
Q Naturally George could see in the rear-view mirror, as far as you know?
A Yes, sir.
MR. FOTI: Your Honor, I am going to object, that calls for an assumption on the part of this witness.
MR. AMADEE: Your Honor, may I be heard on that?
THE COURT: Answer the question.

BY MR. AMADEE:

Q George could see in the rear-view mirror, as far as you know?
A Right.
Q And Lionel Payton could see, as far as you know?
A I don't believe so.
Q But you could see?
A Right.
Q Now, you got two rear-view mirrors?
[fol. 19] A Right.
Q Now, describe where they are insofar as the cab is concerned?

A One is on the right side and one is on the left side.
Q Are they rear-view mirrors or side rear-view mirrors?
A Alongside mirrors.
Q Outside the cars?
A Right.
Q You got two of them?
A Right.
Q Now, you said you were at what address?
A 2139 Third.
Q That is the corner?
A Yes, sir.
Q Of what two streets?
A Third and Loyola.
Q You mean Simon Bolivar or do you mean Loyola?
A Loyola.
Q That is one block from Simon Bolivar or two?
A I believe it is three blocks from Simon Bolivar.
Q Combing back to Claiborne?
A Coming back to the River.
Q Or going up to the River?
A Right.
[fol. 20] Q What had you done at the store shortly there before?
A We had made a delivery.
Q What had you delivered?
A Coca-Cola.
Q How many cases?
MR. FOTI: Your Honor, I'm going to have to object.
THE COURT: Objection sustained.
MR. FOTI: This is irrelevant.
MR. AMADEE: Same Exception, your Honor; same Bill.

BY MR. AMADEE:

Q Now, you had completed your delivery?
A I did.
Q And about what time was this?
A About three-thirty in the afternoon.
Q You had a watch?

A I assumed it was three-thirty because at the time I arrived I saw the time.

Q Did you have a watch.

THE COURT: Would you let him finish answering the question?

[fol. 21] MR. AMADEE: Pardon me.

THE WITNESS: As I went back into the grocery store to make the call for the police, I noticed the time.

Q In other words, when you got back in there it was three-thirty?

A Right.

Q Now, Mr. Frischertz, who was in the store when you got back?

MR. FOTI: Your Honor, I am going to have to object to this as this is irrelevant.

MR. AMADEE: This is res gestae. I might want to call some of these people as witnesses.

THE COURT: You better quit making speeches.

Please don't make me have to tell you that over and over again.

MR. AMADEE: He objects to everything.

THE COURT: Mr. Amadee.

[fol. 22] MR. FOTI: I have a right to object without innuendoes.

THE COURT: If you don't stop, you're just going to create an unpleasant situation.

MR. AMADEE: Judge, I am not entitled to say anything?

THE COURT: Don't keep arguing with me.

MR. AMADEE: I am not arguing; I am questioning the man.

THE COURT: You make an objection and I will rule on it. When he makes one, I will rule on it. I do not want you making speeches over and over.

MR. AMADEE: What question. You don't want—

THE COURT: Take the Jury over across the hall for a minute.

(Whereupon the Jury was sequestered.)

MR. AMADEE: Judge, could this be in chambers?

THE COURT: No, it is going to be right here.

[fol. 23] Now, listen to me, pay attention close because I am going to tell you: I just put one lawyer in jail two days ago and I didn't like to do it, you understand, but you are pushing me and you better stop pushing me right now. You start acting like a lawyer in this Courtroom and quit rambling all over the place making funny jokes and acting silly.

Now, we are going to conduct this trial like you are a lawyer, like he is a lawyer and I am a judge and it is going to stay that way, and believe what I am telling you, or you are going to make me do something unpleasant for both of us. Now, I don't want to do it, but I'm going to put up with any foolishness from you.

No, you don't open your mouth. I am tired of this silliness. This has been going on since ten o'clock. You have been cutting up like you are fifteen years old. You are a grown man and you have been a lawyer twenty years and you better act like one. And when I rule, you keep your mouth shut and take your Bill of Exceptions. [fol. 24] When he gets out of line, I am going to stop him. Don't tell me what I got to do and what I don't have to do when I tell you you can't do something. Don't do it, you understand me?

MR. AMADEE: I think I have been doing that, Judge.

THE COURT: You haven't been doing it.

MR. AMADEE: Well, I am going to do it from here on out.

THE COURT: I am going to tell you you'd better do it. I am sick of this silliness. We got a Jury case and I want this man to get all of his rights protected during this trial, but I don't want to be fooling with you with silliness when we are talking about the serious business. Now, you stop this right now.

MR. AMADEE: Your Honor, at this time I'd like to move for a mistrial.

THE COURT: Look, you'd better sit down.

MR. AMADEE: May I finish?

[fol. 25] THE COURT: There is nobody here to hear?

MR. AMADEE: No, but I would like to move for a mistrial.

THE COURT: Move for a mistrial.

MR. AMADEE: And I'd like to have a ruling.

THE COURT: Your mistrial is denied. And just believe what I am telling you.

MR. AMADEE: To the ruling of the Court on the mistrial, I want to make a formal Bill of Exceptions making all of the interruptions by the District Attorney's Office, specifically Mr. Foti; I want to make the entire record—

THE COURT: Stop laughing. This is what has got to stop. Quit laughing at him when he starts acting this way.

MR. AMADEE: I want to make the entire record and all of the testimony and what-not of this man—

[fol. 26] THE COURT: Make a legal bill, no what-not. There is no such word in this record.

MR. AMADEE: So forth then.

THE COURT: Not so forth. Specifically state what you want to be part of this Bill.

MR. AMADEE: Everything that is in this record a part of the Bill.

THE COURT: All right. Put that in the Bill.

Now, just keep in mind what I told you. You have got a man to represent here; represent him and don't fight me.

MR. AMADEE: Judge, I am not fighting you; I am fighting him.

THE COURT: No, you are not. You keep interrupting; then you keep making speeches when you know you're not supposed to. Now, pay attention to your client and quit doing all these things that I am telling you not to do.

Bring the Jury back in.

(Whereupon the Jury was brought back into the Courtroom.)

[fol. 27] CROSS EXAMINATION

BY MR. AMADEE:

Q Mr. Frischertz, what were the weather conditions of this date?

A Good.

Q It hadn't rained?

A No, sir.

Q And was the sun shining at that time?

A Yes, sir.

Q Was there a glare in the rear-view mirror so far as you know?

A No, sir.

Q The rear-view mirrors had been adjusted by you as you got in the car so you could see behind you or are they already stationarily adjusted?

A You can adjust them, but most of them are permanently adjusted.

Q Now, where did the subject you saw come from?

A He came from the rear of the truck, from the rear of the right side of the truck.

Q In other words, what you are saying is that he must have passed the door of the grocery store at 2139?

A He may have. He came from the rear of the truck. I couldn't see him in back of the truck, but he came [fol. 28] from the rear of the truck.

Q Well, how was the rear of the truck, as far as you know, in relation to the door of the grocery store?

A The truck was on the left-hand side of the street right by the grocery store.

Q Across the street from the store?

A No, it was not. It was right by the grocery store.

Q Looking at the River?

A Right.

Q Then the grocery store was on the downtown, industrial canal side of that street?

A Yes.

Q It is not on the Jefferson Parish side of that street?

A No.

Q But it was on the downtown—was it the lake side or the river side looking: In relation to the river, the late, the Industrial Canal—

A It was headed towards the River.

Q I know, but I say on the left side: I know that is the Industrial Canal side or the Canal Street side?

A Right.

Q What street was this?

A It was on the Canal Street side.

[fol. 29] Q What street?

A On Third Street.

Q Now, was it in relation to the four intersections, was it on the River side or the Lake side of that Canal Street side?

A What would you consider the River side?

Q Well, I would consider that if I walked up Third Street and you say this is Loyola, when I got to Loyola —you got that intersection—well, if the store was here (indicating): You know that?

A Are you walking towards the River?

Q I am walking towards the River and the store is like here—I haven't crossed the street—that would be the Lake side?

A Well, that is where—that is it.

Q If I walked across the street, that would be the River side?

A Well, that would be the River side if you walked across the street: That is where the truck was situated.

Q In other words, what you are saying: It was on the left, meaning Canal Street in my terminology, River side of Loyola?

A Of Third Street.

Q Of Third and Loyola, is that correct?

[fol. 30] A Right.

Q Then this store is on the corner, correct?

A Right.

Q Then the subject must have been in the middle of the street somewhat of Loyola and Third?

A The subject?

Q The armed robber, the purported armed robbery?

A Right. He was coming up Third Street from the rear of the truck.

Q Now, are you telling me that you recognized him in the mirror or you just knew it was a subject, a Negro subject?

A At first I thought it was somebody coming to tell me that somebody needed a Coke because this fellow across the street usually bought Coke. He wasn't on my route, but it was a different—

Q Who was this fellow across the street?

A The Dream Boat Lounge.

Q Do you know his name?

A I don't know his name offhand.

Q What kind of looking fellow is he?

A I'd say he is a fellow.

Q Is he black?

A No.

Q Is he brown?

A No.

[fol. 31] Q I mean, what color is he?

A He is white?

Q Well, then, this subject looked like him coming to you?

A No. I thought it was somebody that he had sent to tell me that they needed Coke over there.

Q But you don't know who the fellow was up to that particular point?

A Right.

Q There was no recollection of anybody that you knew?

A I did not recognize him as being anybody that I had known before, right.

Q Now, what happened?

A He came running up from the rear of the truck, from the right side and he brandished a gun as he got to the door of the truck where I was sitting.

Q Now, was the gun in your face?

A He was moving it like that at all three of us (indicating).

Q And you gave him the money?

A He told me, he says, "Give me all your money."

Q That is not what I asked you. Did you give him all of the money?

A I did give him the money.

Q You reached down in your pocket and took everything that you had—

[fol. 32] A I reached in my pocket and got my bills out and I gave him that; then he asked for my wallet.

Q Now, where did this subject then go?

A He ran from the truck back the same direction he came and around and back down Third Street.

Q He ran back Third Street: He ran back the direction you saw him come from?

A He ran back of the truck and he went out towards Loyola.

Q You are sure it is not Third?

A No, I am positive.

Q You were wrong when you said Third?

A I was wrong when I said Third.

Q And he disappeared?

A Right.

Q Well then what did you do?

A I jumped out of the truck and went to the rear of the truck and I saw him running away from me. He was already a block away so I went into the grocery store and called the police.

Q But his rear was in your office: I mean, running rom you, you could just see his rear from head on down?

A Right.

Q And you went back into the store?

[fol. 33] A I did.

Q Did the two Negro helpers go back in the store with you?

A They did.

Q Immediately?

A No, not immediately.

Q And what was the first thing you did when you got back into the store?

A I asked the lady where her telephone was and she let me use her telephone?

Q Did you call the police?

A I did.

Q What did you do after that?
A I sat and waited for the officers to come.
Q How long?
A I'd say it might have been ten, say fifteen minutes.
Q Now, in the meantime, while you were waiting, did you talk to anybody: Did you tell them about it, anybody about it?
A I just told the lady that I had been robbed and I'd like to call the police.
Q What is the lady's name?
A Mrs. Brown.
Q Did you see her over in the witness room? That is the store owner, huh?
A The store owner, yes.
[fol. 34] Q You told her then what happened, what you thought, what you had seen happen, correct?
A Right.
Q Was anybody else in the store at that time?
A No.
Q I mean, you say it was three-thirty, what I want to know at three-thirty on this particular time, about how many people were in the store?
A I'd say that when I went in the store to ask her to use the phone there wasn't anybody but her in the store at that time.
Q Only Mrs. Brown?
A Right.
MR. FOTI: Your Honor, I'm going to have to object. This is irrelevant: Who was in the store after the robbery.
THE COURT: He has already answered the question.
MR. AMADEE: Wnat is your ruling then?
THE COURT: He has already answered the question.
MR. AMADEE: That is correct. What is your ruling?
[fol. 35] THE COURT: That he has already answered it.

BY MR. AMADEE:

Q When the police came, what time was it, about?
A I'd say it was about a quarter to four.

Q Three-forty-five?
A Uh-huh.
Q How many came?
A One officer came out.
Q Do you know his name?
A I believe his name was Turgeau: I believe that is how you pronounce it.
Q He was a patrolman: He wasn't a lieutentant or anything like that, plain patrolman?
A Right.
Q Now, did you give him a statement?
A I did.
Q Briefly do you recall your statement to the Officer Turgeau?
A Well, I told him that I had just came out of the store and I had gotten in the truck already and we were getting ready to pull away from the curb and I saw this fellow coming up in the rear view mirror of the truck, and he came up to the door and he pulled a revolver on me and he asked me for the money. So I gave him all of the money and he asked me to describe him.
[fol. 36] Q Did you describe him?
A I described him.
Q Would you relate that description that you gave at that time?
A I said he was about five-nine, between five nine and five-ten, about 160, 165 pounds and he had—he asked me what type hair did he have.
Q Who asked you that?
A The officer.
Q He didn't let you tell, he asked you?
A He asked me if it was short hair or long hair and I told him it was short hair.
Q Go ahead. Did he ask you any more questions?
A No. He asked me what he was wearing and I told him he had a grey sweatshirt and a hood.
Q What kind of hood?
A A regular combination hood and a sweater shirt, made together.
Q Did you tell him what color it was?
A Gray.

Q Now, well, you say it was gray. Go ahead: Go on with your description.

A And I told him he had tennis shoes on and dark trousers.

Q Black?

A I just said dark; I didn't know whether they were [fol. 37] black.

Q You don't know what color they were: You weren't positive about the color?

A No, I wasn't positive about the colors.

Q What else?

A And that after—he asked me what he did after he took the money and I told him he jumped off of the truck, jumped from the truck, ran around to the back and took off down Loyola Street.

Q Did he ask you any other questions?

A Not that I can remember. He asked me how much money was taken and I told him between five and $600.00.

Q Was it a situation of you narrating to him what happened voluntarily or him interrogating you?

MR. FOTI: Your Honor, I am going to have to ask that the witness not answer this question in that it is irrelevant. I haven't objected before but I think this is irrelevant and immaterial.

THE COURT: Objection sustained.

MR. AMADEE: To the ruling of the Court, counsel [fol. 38] would like to reserve a Bill of Exceptions making the question propounded, the objection of the District Attorney and the ruling of the Court a part thereof.

EXAMINATION BY MR. AMADEE:

Q Continue the description, Mr. Frischertz.

A He asked me if it was light skin or dark skin.

Q What did you tell him?

A I told him it was dark skin.

Q What else did he ask you?

A That is all I can remember that he asked me.

Q Is it possible that he could have asked you something else?

A It is possible.

Q That you don't remember at this time?
A Right.
Q Without being faceous, Mr. Frischertz, at the time this person, whoever he was, was robbing you, you were fearful?
A At first I wasn't but after it happened, I was.
Q At first you felt like fighting?
A At first I was—right, I just, I became sort of numb, and after that—
Q I understand. I know what you are talking about. Now, what about the line-up, or was there a line-up?
A Yes. There was a line-up.
[fol. 39] Q Do you know the date of the line-up?
A As far as I know, it was the twenty-third of January.
Q Pardon me, the twenty-third of January, 1968?
A Right.
Q Now, was that the only line-up you attended?
A Right.
Q You never attended any other?
A No.
Q And where was that line-up?
A That was held—I don't know which building they call it—it was held in the new building across the way from here.
Q It was held in the new building?
A Uh-huh.
Q Where did you have to meet them for the line-up: This building, the detective office?
A Right.
Q That is on the first floor?
A I believe it is, yes, sir.
Q It is down from where the blind man sells things?
A Yes.
Q And it is pass the Sheriff's Office: You know where the Sheriff's Office is?
A It is on the first floor.
[fol. 40] MR. FOTI: He stated where it was: The detective's office.
THE COURT: Proceed.

BY MR. AMADEE:

Q Now, what I want to know is who you talked to first?

MR. FOTI: I am going to have to object: This is immaterial.

THE COURT: It is hearsay besides. Objection is sustained.

BY MR. AMADEE:

Q Who accompanied you to the line-up from the detective's office?

A I don't know the names, the officer's names. There were several other people that had gone with me but I don't know their names.

Q You mean there were several people going to the lineup at your time?

A Right.

Q Were they men or women?

A A few women and mostly men, I'd say.

Q Were they white or black?

A That is immaterial: What the color of them was. [fol. 41] THE COURT: Objection sustained.

MR. AMADEE: To the ruling of the Court, counsel would like to reserve a Bill of Exceptions making the question propounded, the objection of the District Attorney and the ruling of the Court a part thereof, and the entire record.

BY MR. AMADEE:

Q Were any subjects brought over at that time with you, other prospects, suspects?

THE COURT: Do you know what he is talking about?

THE WITNESS: Other people that have been involved, you mean?

THE COURT: No. He doesn't understand what you are talking about; clarify your question.

BY MR. AMADEE:

Q What I am saying is: Were the people who they were going to make the line-up brought along over—

A No, sir, not with us.

Q You didn't see anybody like that?

[fol. 42] A No, I didn't.

Q That is why I asked again: Were there any Negro males or Negro females—

MR. FOTI: I am going to have to object to whether they were Negro or white.

THE COURT: The objection already has been sustained on that question.

MR. AMADEE: Same exception, your Honor.

BY MR. AMADEE:

Q Your had to walk something like 300 yards to the new building?

MR. FOTI: Your Honor, I fail to see the relevancy of this.

THE COURT: Objection sustained.

MR. AMADEE: Your Honor, I'd like to reserve my Bill: Same ruling, same objection, same Exception.

BY MR. AMADEE:

Q When you got over to the new building, do you know who you first talked to?

A No, I don't know anybody's name that I talked to [fol. 43] over there.

Q Who showed you any mug shots?

A Well, we went to the line-up over there and I sat in the theater and they brought these men out there.

Q But the question was: Who showed you any mug shots?

THE COURT: You are assuming that. Ask him if he was shown any.

BY MR. AMADEE:

Q Were you showed any mug shots?

A You mean previous to the line-up?

THE COURT: How can he know when you are talking about?

THE WITNESS: No, not previous to the day of the line-up.

BY MR. AMADEE:

Q When were you shown them?
A I wasn't shown the day of the line-up: I was shown the day that I was robbed.
Q You were shown mug shots?
A Yes. I came up here and looked at some of the mug shots.
Q You never were shown any more after that?
A No, sir.
[fol. 44] Q You weren't shown any at all the day of the line-up, as you said?
A No, I wasn't.
Q Did you identify any of the mug shots?
A I did.
Q And what date was that?
MR. FOTI: I think that I'd like that question rephrased. If he is going back to the mug shots: Are you talking about mug shots or is he talking about at the line-up.
MR. PHILIP STEIN: Mug shots.
THE COURT: One counsel at a time.
MR. AMADEE: Your Honor, this is cross-examination.
THE COURT: I said one lawyer at a time.
MR. AMADEE: No, I was just telling him this is cross-examination.
THE COURT: I understand that. What time were you asking the man about, Mug shots or the line-up?
[fol. 45] MR. AMADEE: Mug shots.
THE COURT: He is asking you did you identify from the mug shots that were shown to you?
THE WITNESS: I tentatively identified—I picked out about two or three of them that looked similar.

BY MR. AMADEE:

Q Tentatively: You mean that there could have been two or three that had done it?
A No.
Q Two or three that looked like the one?
A Looked similar, right.

Q And this was how many days after it happened?
A That was the same evening.
Q That same afternoon when it was fresh in your mind: Was it fresh in your mind?
A Yes.
MR. FOTI: That calls for a conclusion.
THE COURT: He has already answered the question.
MR. AMADEE: He would know if it was fresh in his mind.
THE COURT: He has already answered the question, Mr. Amadee.
[fol. 46] MR. AMADEE: Thank you, Judge

BY MR. AMADEE:

Q When you went to the line-up, how many people besides you were sitting out there?
A I'd say about eight or nine.
Q Eight or nine. Do you know whether or not any Negros were sitting out there?
MR. FOTI: Your Honor, I am going to object to this question. This is the third time.
THE COURT: Objection sustained.
MR. AMADEE: I'd like to raise a Bill of Exceptions, I mean, save a Bill of Exceptions making the question propounded witness, the objection of the District Attorney, the ruling of the Court and the entire record a part thereof.

EXAMINATION BY MR. AMADEE:

Q How many females were sitting out there, if you know?
MR. FOTI: I am going to have to object to that: It is immaterial.
[fol. 47] THE COURT: Objection sustained.
MR. AMADEE: Same Bill; Same Exceptions.

BY MR. AMADEE:

Q How many males?
A I'd say, about, maybe, six or seven.
Q Sitting out there with you?
A Right.

Q How many of them were police officers?
A I wouldn't know.
Q Were any of them police officers?
A Sitting out there with us?
Q Yes. Aside of you: With you?
A No.
Q No police officers had accompanied you there?
A There was, I'd say, one or two of them, but they weren't sitting with us.
Q Well, let me ask you this: Tune your attention to that date, and I know it is a stretch of your memory—
MR. FOTI: Your Honor, I am going to object.
MR. AMADEE: I was just trying to lay a predicate.
[fol. 48] THE COURT: Don't make statements about his memory or anything else like that. Ask him a question.

BY MR. AMADEE:

Q There's a police officer outside. I could call him in, but I'm not going to do that to the State.
MR. FOTI: Once again if he wants to call a police officer, let him call the police officer.
THE COURT: Mr. Amadee, didn't you understand what I told you before?
MR. AMADEE: Yes, sir. And I am ready to go get him.
THE COURT: You are ready: Don't make any more statements.
MR. AMADEE: That is correct. I'm ready to go get the officer because I was trying to save time.
THE COURT: Don't save my time when it has anything to do with this man's trial.
THE COURT: If you have the person you want this witness to look at?
[fol. 49] MR. AMADEE: From the Detective Bureau who handles the line-ups.
THE COURT: Is he outside in the hall?
MR. AMADEE: I saw him.
THE COURT: If he is in the hall, fine; if he is not in the hall, we are not going to wait while you go calling some place for him.
MR. AMADEE: May I take a look, your Honor?

BY MR. AMADEE:

Q Mr. Frischertz, do you recognize that gentleman?
THE COURT: Wait a minute. Let the witness step out of the Courtroom first.

BY MR. AMADEE:

Q Did you recognize that gentleman?
A I did.
Q Did you see him on that date?
A I did.
Q Where did you see him on that date?
A He is the gentleman wthat took the statement from me.
[fol. 50] Q At the Detective Bureau?
A Right.
Q Did you see him at Central Lockup near the line-up that day?
A I am not sure whether I did or not: No.
Q Do you know whether or not he was one of the six or seven males sitting out there that day?
A No, he wasn't sitting us.
Q Is he the officer who had originally showed you the mug shots the first day?
A The day I was robbed: No.
Q Was he with the officer that showed it to you?
A No.
Q You only saw him over there when you gave him a statement?
A Yes, sir.
Q What was the statement you gave him?
MR. FOTI: Your Honor, I am going to have to object.
THE COURT: Objection sustained.
MR. AMADEE: We would like to reserve a Bill of Exceptions making the request for the statement by this gentleman on the cross-examination, the objection of the [fol. 51] State and the ruling of the Court, and the entire record a part thereof.

BY MR. AMADEE:

Q Now, let's get to the line-up, Mr. Frischertz: What happened at the line-up, tell us about it in your own words?

A I identified this man as being the man that held me up.

Q Did you identify him by a number?

A No.

Q If I showed you a picture, would it refresh your recollection: Is that the line-up?

A Yes, sir.

Q Were there a number at that date?

A There were.

Q I ask you if: Did you identify them by number?

A I did not. I identified him, then picked the humber.

Q But you did identify by numer?

A Not by number. I identified his face.

Q And then tied a number in with it?

A Right.

Q But there was always a number around his neck, correct?

A Right.

Q And that number was four?

A Right.

Q And did you identify him as to position in the line-up?

[fol. 52] A No.

Q Do you know how many persons were in the line-up: I just showed it to you?

A Seven.

Q Who was the middle man?

A The middle man?

Q Yes. Number four—three on one side and three on the other—who was the middle man?

MR. FOTI: Your Honor, I am going to have to object.

MR. AMADEE: I think this is important.

THE COURT: Objection sustained.

MR. AMADEE: Your Honor, at this time we would like to reserve a Bill of Exceptions making the question

propounded concerning the position in the line-up, this picture and the entire record a part thereof.

BY MR. AMADEE:

Q Was he one of the shorter men in the line-up?
A He was.
Q The fact of the matter is he was one of the three short men, is that correct?
A As far as I can remember.
[fol. 53] Q Isn't that correct?
THE COURT: He answered you, Mr. Amadee.

BY MR. AMADEE:

Q And these three short men were all put in the middle—you would want to see it again or do you recall?
A I don't recall.
They were all in the middle.
Q In other words, three men of approximately the same height, approximtaely the same weight and they were surrounded by two men on each side, tall, and they were in the middle, is that correct?
A Uh-huh.
Q And the defendant, Frank Johnson, was in the middle, middle, is that correct?
A Right.
Q When you saw him, you immediately recognized him, is that correct?
A I did.
Q No officer was sitting beside of you prompting you?
A No.
Q No one had made any suggestions to you at the Detective Bureau?
A No.
Q No one in Central Lockup, officer or otherwise, had [fol. 54] given you any hint?
A No.
Q As to how the line-up may be set up?
A No, sir.
Q And you didn't see the line-up made up?
A No.

Q And you don;t know who made the line-up up.
A Right.
Q Now, you are positive now that you identified three possible persons in the mug shots: You aren't positive about that?
A Right.
Q You weren't sure at the time?
A Right.
Q But at the line-up you were sure?
A I was.
Q Now, were you more sure at the line-up than you were when you had the mug shots?
A I was more sure at the line-up.
Q And were you more sure with the mug shots than when you were looking in your rear view mirror on the date of the offense?
MR. FOTI: I don't understand that.
MR. AMADEE: I understand.
[fol. 55] THE COURT: Objection sustained.
MR. AMADEE: To the ruling of the Court, counsel would like to reserve a formal Bill of Exceptions making the question propounded by defense counsel, the objection of the Assistant District Attorney and the entire record including the testimony of Mr. Frischertz a part thereof.
Your Honor, we are finished with this witness.
THE COURT: Do you have any other questions of this witness?
MR. FOTI: Just one question.

## REDIRECT EXAMINATION

BY MR. FOTI:

Q Were you shown a picture of the defendant in this case on the day of the robbery when you observed the mug shots?
A No.
Q When you say you made an identification, you picked out people that were similar in built and facial characteristics, is that what you are talking about?

A Right.

[fol. 56] Q Is there any question in your mind today that this is the man that held you up on December 26th?

A There is not.

Q Was there any question in your mind on the date of the line-up that this was the man that held you up on December 26th?

A No.

MR FOTI: No further questions.

## RECROSS-EXAMINATION

### BY MR. AMADEE:

Q You say when you picked the mug shot, the defendant's picture was not in those three shots?

A As far as I can recollect, it was not.

Q It was not. Anybody testified to the contrary would be lying, as far as you know?

MR. FOTI: He is assuming a point of evidence that is not a fact.

THE COURT: Objection sustained.

MR. AMADEE: Well, your Honor, I will ask it another way.

THE COURT: No, you won't: The objection is sustained. You will not ask it again.

[fol. 57] MR. AMADEE: I will reserve my Bill of Exceptions making the questions propounded by defense counsel, the objection of the State and the ruling of the Court and the entire record including this witness' testimony specifically a part thereof.

I'm through with the witness, your Honor.

* * * *

RENE BELSOM, after having been first duly sworn by the Minute Clerk, did testify as follows:

## DIRECT EXAMINATION

### BY MR. FOTI:

Q State your name and occupation, please?

A My name is Rene Belsom; I am a patrolman; I am employed in the Bureau of Identification.

Q How long have you been so employed?
A I have been employed for this Department for four years.
Q And what is your primary duty?
A I take photographs and test areas for finger prints.
Q Have you been qualified as an expert in photography?
A No, sir.
Q Did you have occasion on January 23, 1968, at approximately nine-seventeen in the morning to take a line-up picture?
A I did.
[fol. 58] Q I show you what the State has marked S-1 and ask you if you can identify what the State has marked as S-1?
A I took this photograph, sir.
Q And would you tell the Court how you can identify it?
A Because from the moment the picture is taken until the picture is developed and stamped, no one handles it but me.
Q What does the stamp on the back read?
A "Identification Bureau, New Orleans Police Department, Photographing Department, Date: 1/23/68, Time: 9:17 a.m., Photographer: Rene Belsom." That is my signature.
Q Did you mark on there who the Number Four man was?
A No, sir.
Q You took this picture on January 23, 1968?
A Yes, sir.
Q And you kept it in your possession all of the time?
A I brought it back and developed it and made a copy of it and stamped it and it was used in Section—
THE COURT: No, don't tell us about anything like [fol. 59] that. What did you do with the picture?
THE WITNESS: I turned it over to the District Attorney.
MR. FOTI: No further questions.
MR. AMADEE: What section are you talking about?

MR. FOTI: Your Honor, I am going to object.

THE COURT: Objection sustained.

MR. AMADEE: Your Honor, I am going to move for a mistrial. This man has alluded to another section. Unless it is something not about my client, I am going to have to move for a mistrial.

THE COURT: Motion for mistrial is denied.

MR. AMADEE: At which time counsel for the defendant would like to reserve a formal Bill of Exception making this picture, making the testimony of the witness, making his attempted allusion to another section, making my attempt to elicit it from him and the ruling [fol. 60] of the Court and the entire record a part thereof.

THE COURT: Disregard that word "section:" It has no meaning in this trial whatsoever.

## CROSS EXAMINATION

BY MR. AMADEE:

Q Now, Officer Belsom, how long have you been on the police force?

A Four years.

Q You say you have never studied photography?

A I didn't say anything to that effect.

Q Well, did you?

A I have been doing photographic work since December. No, I haven't studied anything.

Q In other words, you never went to a photography school?

A No, sir.

Q Did you ever study under another photographer, expert?

A I don't know if any of them—I don't know who in my department is classified as an expert.

Q Maybe none of them, I don't know. You might not have any experts, you are saying?

THE COURT: Ask a question: Quit making a speech.

[fol. 61] BY MR. AMADEE:

Q Do you have any expert photographers?

THE COURT: He isn't qualified to answer that. As him who, if anyone, he was taught by.

BY MR. AMADEE:

Q Who were you taught by, Officer Belsom?

A Sgt. Gorman, Lieutenant O'Neill, Lieutenant Lartigue.

Q So you know how long they have been engaged in photography?

A I do not.

Q How long did you study under Sgt. Gorman?

A I have been working there since December studying undera all three people.

Q December when?

A December of 1967; the exact date, I do not know.

Q Then you have been in this for some six months?

A Yes, sir.

Q That is the extent of your experience?

A Yes, sir.

Q Do these men still work with the Department?

A Yes, sir.

Q They are still working in photography?

A Yes, sir.

Q They are your supervisors?

[fol. 62] Yes, sir.

Q They are here in this building now?

A They were when I came up here.

Q I mean, they were available to a Court subpoena?

A Yes, sir.

Q Now, when you say this was in your possession, you mean that it was not in possession of Sgt. Gorman?

A Yes, sir.

Q And it was not in possession of Lt. O'Neill?

A Right.

Q And it was not in possession of Lt. Lartigue?

A Right.

Q Did they have anything whatsoever to do with this?

A No, sir.
Q Did not supervise you on things like that?
A I took that picture by myself; I developed it by myself and I printed it by myself.
Q Did you put the place where it was taken?
A It is in the book in my office; it is not on there.
Q It is not on the picture?
A We put "show-up" as the location.
Q It is not on here?
A No, sir.
Q Why not?
A It is not on the stamp.
[fol. 63] Q I don't hear you?
A It is not on that stamp. There is no place for me to put it: I have never been told to.
Q It is impossible to put that on the stamp?
MR. FOTI: That is immaterial.
THE COURT: Objection sustained.
MR. AMADEE: No, your Honor.
THE COURT: Objection is sustained.
MR. AMADEE: I'd like to reserve a Bill to the ruling of the Court making the question propounded by counsel and your Honor's—any member of the Jury who is dissatisfied, I think he ought to get off of the Jury because this trial, this is going to last a long time.
I would ask that the juror be excused if he has remarks to make. I think you hear it also.
THE COURT: I didn't hear anything.
MR. AMADEE: Well, I will forget it.
[fol. 64] THE COURT: Gentlemen, if anybody did make any comment—I don't know if anybody did—please don't. Reserve your comments about this trial until when you get together to deliberate: Not before then.
You better be sure what you are talking about before you make accusations about people.
MR. AMADEE: I could almost point the man out but I don't want to do that. I looked in his face.
THE COURT: You better be.
Gentlemen, just accept what I told you.
MR. AMADEE: Your Honor, because of that at this time I'd like to move for a mistrial.

THE COURT: Based on you making an accusation at a juror?

MR. AMADEE: No, on the basis that —

THE COURT: Motion is denied.

MR. AMADEE: On the basis that the Jury made comments detrimental to the rights of this man because [fol. 65] they are either too tired or they think that I am a fool or something like that. I'd like to move for a mistrial.

THE COURT: You want all of that in the record: What you just characterized yourself?

MR. AMADEE: Yes, sir, as a fool.

THE COURT: Put it in the record. The motion for a mistrial is denied.

MR. AMADEE: At this time I'd like to reserve a formal Bill of Exceptions making my motion for a mistrial, making my comments, making whatever comments might have been caught by the stenographer from some of the jurors—

THE COURT: The only think that this stenographer is going to catch is what is testified to or stated by somebody. There is no evidence in there that there was any comment made, so don't try to inject one in your Bill when there is none in the record.

MR. AMADEE: I heard some sighs, your Honor.

I will proceed.

[fol. 66] BY MR. AMADEE:

Q You said you didn't put the place where this was taken?

A That is right, sir.

Q The book that you are talking about, where is it?

A It is in my office.

Q Is it under lock and key?

A It is in the shelf in the office, not under lock and key.

Q It is available to this Court?

A Yes.

Q I could see that book?

A I assume you could.

Q Now, this was taken by you exactly like it was here? I mean, you snapped what you saw there?
A Yes, sir.
Q You snapped what the camera saw?
A Yes.
Q Why is that black line there—you see it?
A Because in the show-up room the panel is divided by sections and that happened to be a metal clamp that holds the glasses together.
Q Do you know who designed the show-up room?
MR. FOTI: Your Honor, this is immaterial.
[fol. 67] THE WITNESS: I have no knowledge.
THE COURT: Do you really want that question answered?
MR. AMADEE: No, your Honor. Strike it.
THE COURT: Well, I didn't think you did.
MR. AMADEE: I don't want Mr. Foti to start screaming.

BY MR. AMADEE:

Q You didn't set up the line-up?
A No. I had nothing to do with the line-up except taking a picture.
Q Was it already set up when you got there?
A Yes, sir.
Q Was it set up while you were there?
A No, sir.
Q Do you know who set it up?
A I have no idea.
MR. AMADEE: Thank you, sir. No further questions.
MR. FOTI: At this time, the State offers, introduces and files—
MR. AMADEE: Objection.
[fol. 68] THE COURT: Will you please wait a minute.
MR. FOTI: The State offers in evidence S-1.
MR. AMADEE: Objection, your Honor. May I be heard?
THE COURT: Make your objection.

MR. AMADEE: Number One, there is no place on it—I don't know where it was taken; I am not going to guess. Number Two, this man is not an expert. He is learning to be an expert studying under men who are available as experts and could have been used. This is a very serious crime. I'm not going to talk about nothing else other than that. It is a serious crime. The man doesn't know too much about what happened, and that is good.

MR. FOTI: Your Honor--

THE COURT: Make your objection.

MR. AMADEE: So I object to this as not being the best evidence.

[fol. 69] THE COURT: Objection is overruled.

MR. AMADEE: To the ruling of the Court, counsel would like to reserve a formall Bill of Exceptions making S-1—I think that is what he designated it—all of the questions propounded by both the State and defense to Officer Belsom and all other parts of the record a part thereof.

THE COURT: Gentlemen, I am going to ask you a serious question and I want you to give some serious thought to what I ask you. We all are human and we all have feelings and everything that goes with it. Did the remarks by Mr. Amadee in anyway get to any of you to the point that you think it might interfere with your ability to decide this case: I mean, if you have any doubts in your mind, then I want you to tell me. I want to be sure that nothing has happened here that has in anyway prejudiced this client's right to have a fair trial, and when I use the word "prejudice", I mean it in the [fol. 70] sense that human nature being what it is in all of us. If any of you have any such doubts, don't be afraid to tell me. If you don't, fine, but if you do, fine: I want to know.

MR. AMADEE: Could I approach the Bench on that?

THE COURT: There is no need to approach the Bench. If you want to say anything in response to what I said to this Jury—

MR. AMADEE: That is correct.

THE COURT: Well, say what you want to say.

And let the record further show that all of the jurors responded in the negative.

MR. AMADEE: Your Honor, I would move to be given an opportunity, either me or the State or the Judge to ask them specifically whether or not their minds are pro-State or Anti-Defense.

THE COURT: I have asked these jurors and I am satisfied with their answers and that is good enough for me. Your motion is denied.

[fol. 71] MR. AMADEE: To the ruling of the Court on the question of whether or not these jurors are Pro-State or Anti-Defense or Pro-Defense and Anti-State, counsel would-like to object and reserve a formal Bill of Exceptions making the entire record and all questions, et cetera, a part thereof.

THE COURT: Call your next witness.

* * * *

PATROLMAN GUSTAVE TURGEAU, after having been first duly sworn, did testify as follows:

DIRECT EXAMINATION

BY MR. FOTI:

Q State your name and occupation, Officer?

A Gustave Turgeau, New Orleans Police Department.

Q Were you so employed on December 26, 1967?

A Yes, sir. I was.

Q Did you have occasion at approximately three-forty-five, between the hours of three-forty-five and four o'clock to respond to a call on Third Street?

A Yes, sir, I did.

Q From one Mr. Eugene Frischertz?

[fol. 72] A Yes, sir.

MR. AMADEE: I am going to object to any further leading. I think that is enough.

THE COURT: Ask you next question.

BY MR. FOTI:

Q Would you please tell the Court what occurred on your arrival on the scene?

A When I arrived on the scene, I learned from Mr.—

THE COURT: Don't go into what anybody told you: Just what your investigation consisted of without any conversation you had with anyone?

THE WITNESS: Through investigation I learned that a driver for the Coca-Cola Company of New Orleans had been held up by a Negro male. He had been held up at gunpoint and $600.00 had been taken. I took a description of this Negro male; I put it over the Police radio; made my report—

Q This was in the City of New Orleans?

A Yes, sir.

MR. FOTI: No further questions.

[fol. 73] THE COURT: Do you have any questions of this witness?

MR. AMADEE: Yes, sir.

THE COURT: Well, ask them.

MR. AMADEE: Your Honor, pardon me. I was just reflecting.

CROSS EXAMINATION

BY MR. AMADEE:

Q You say the driver had been held up by a Negro male?

A Yes, sir.

Q It couldn't have been a white male?

A He told me a Negro.

THE COURT: We are not going to go into what the man told him.

MR. AMADEE: No, I say, it could not have been.

THE COURT: I say we are not going to go into what anybody told him: That is hearsay testimony.

MR. AMADEE: Oh, I see.

Well, your Honor, I would move that all of the testi-

[fol. 74] mony be stricken from the record as all hearsay.

THE COURT: Ask a question.

There is no such thing in our law as a motion to strike testimony. Proceed.

MR. AMADEE: Well, I will move that the Jury be advised to disregard the testimony.

THE COURT: Proceed.

BY MR. AMADEE:

Q You say you put something out over the radio?
A A description of the wanted subject.
Q Is there a record of that description?
A Yes, sir.
Q I mean, I don't want it from you now: Is there a record that could be obtained somewhere?
A Yes, sir.
Q Where is it?
A In my report. I believe the District Attorney has it.
Q In your report?
A Yes, sir.
Q Showing the description?
A Yes, sir.
[fol. 75] Q Did you show the witness any mug shots?
A No, sir.
Q Did you have anything to do with the line-up?
A No, sir.
Q Did you have anything to do with the post investigation on this matter?
A No, sir.
MR. AMADEE: No further questions.
THE COURT: All right, Officer. Step outside, don't discuss your testimony with anyone.
Call your next witness.

* * * *

LAWRENCE VIGURIE, after having been first duly sworn by the Minute Clerk, testified as follows:

DIRECT EXAMINATION

BY MR. FOTI:

Q State your name and occupation, sir?
A Lawrence John Vigurie, Sergeant, New Orleans Police Department.
Q Were you so employed on January 20, 1968?
A Yes.

Q Did you have occasion on that date to arrest one Frank Johnson for the crime of armed robbery?
[fol. 76] A Yes.
Q Is the person you arrested in Court today?
A Yes.
Q Would you point him out, please?
A Sitting next to Mr. Amadee (indicating).
MR. FOTI: Let the record reflect the witness has adequately identified the defendant.
No further questions.

CROSS EXAMINATION

BY MR. AMADEE:

Q You say you arrested him?
A I was one of the arresting officers, yes.
Q You were one of eight?
A One of what?
Q One of eight arresting officers?
A One of the arresting officers.
Q Now, I am asking a specific question: Were you one of eight or more?
A No, I don't think there were eight. There was possibly six men, I think it was.
Q Besides yourself?
A I think six, a total of six.
Q Where did you proceed to for the arrest?
A To the subject's address.
Q And did you know the subject's address at that time?
[fol. 77] A Did I know his address?
Q Where you arrested him from, yes?
A We received information that he did reside there, yes.
Q Well, I want to know that address?
A 2135 Philip.
Q You found him there?
A I found him under a bed at that address.
Q But you found him there: I just want to know.
A I am trying to—yes, I found him at that address.
Q You arrested him. Did you arrest him?

A Yes.
Q You had a warrant for his address?
A I did not have a warrant.
MR. FOTI: Your Honor, I am going to have to object to any further questions on this.
THE COURT: Objection sustained.
MR. AMADEE: I would like to reserve a Bill making all of the things we filed, you know, your Honor, and this question and the answer of the officer, the objection of the District Attorney and the ruling of the Court and my attempt a part thereof.

[fol. 78] BY MR. AMADEE:

Q Now, how was the arrest effected?
MR. FOTI: Your Honor, I am going to have to object to any testimony about that except that the only question at issue is: Was this the same man that was arrested on that day.
THE COURT: What do you mean?
MR. AMADEE: Was he handcuffed?
MR. FOTI: This is immaterial.
MR. AMADEE: I don't think so.
THE COURT: It is immaterial.
Objection sustained.
MR. AMADEE: I'd like to reserve the same Bill, your Honor.

BY MR. AMADEE:

Q How long after you arrested him at 2135 Philip Street was he taken to Central Lockup?
A He was taken immediately to the Detective Bureau.
Q Where is that at?
[fol. 79] A Right downstairs on the next floor.
Q Do you know the number of that office?
A 153.
Q That is on the first floor of the Criminal District Court?
A Yes.
Q About what time did you say he was arrested?
A About six a.m.

Q In the morning?
A Yes.
Q It could have been five-thirty?
A I would say it was around six a.m.
Q It couldn't have been—I would say around six o'clock in the morning.
Now, where did you say you took him to: 153. About what time did you arrive there?
A Possibly twenty minutes.
Q In other words, this means you got there somewhere before six-thirty, give or take a few minutes?
A Yes.
Q Now, did you participate in questioning of him?
MR. FOTI: Your Honor, I am going to have to object to this question.
[fol. 80] THE COURT: This is not relevant at this time.

BY MR. AMADEE:

Q Well, were you present at any time of questioning?
THE COURT: This is not relevant at this time either.
MR. AMADEE: I read you loud and clear, Judge. No further questions.

REDIRECT EXAMINATION

BY MR. FOTI:

Q Officer Vigurie, I only have one question: At the time you arrested Frank Johnson, did you find a weapon in his possession at the time you arrested him?
A No.
MR. FOTI: No further questions.

RE-CROSS-EXAMINATION

BY MR. AMADEE:

Q Have you ever found any weapon in his house, on his possession or what-not connected with this?

A I don't know if you would cover it by what not:
Q On him?
THE COURT: Don't say what anybody said now.
[fol. 81] Q I asked you: On him or his premises?
THE COURT: Did you ever find any weapon? Be specific in your answer.
THE WITNESS: Yes. There was a weapon found.

BY MR. AMADEE:

Q On him?
A Not on his person.
Q Or his premises?
A You said or what-not: I don't know what what-not covers.
Q On him or his premises?
THE WITNESS: Not on him or his premises.
MR. AMADEE: I am satisfied.
MR. FOTI: At this time the State will rest subject to the right of rebuttal.
MR. AMADEE: I need about two or three minutes to collect my thoughts.
THE COURT: You got two or three minutes.
[fol. 82] MR. AMADEE: May I call my office, your Honor?
THE COURT: You may call your office when we have a recess: We don't take recesses to call offices here.
MR. AMADEE: When is the next recess, your Honor?
THE COURT: When the lunch gets here.
MR. AMADEE: Would I have time to take my medicine?
THE COURT: Of course, Mr. Amadee, when lunch-time comes.
MR. AMADEE: No, but I want to take my medicine.
THE COURT: You can take your medicine, too, but please call a witness.
MR. AMADEE: Call the defendant.

* * * *

SUPREME COURT OF LOUISIANA

No. 49,861

STATE OF LOUISIANA

*vs.*

FRANK JOHNSON

On Appeal from the Criminal District Court, Section "G", Parish of Orleans, State of Louisiana. Honorable Frank J. Shea, Judge Presiding.

OPINION AND JUDGMENT—Tuesday Jan. 20, 1970

HAMLIN, Justice:

Defendant was charged by bill of information with the crime of armed robbery. He was tried by a jury of twelve, convicted (the verdict was nine to three), and sentenced to serve thirty-five years at hard labor in the Louisiana State Penitentiary. He appeals to this Court from his conviction and sentence and presents for our consideration two specification of errors, which recite:

1. The arrest of appellant was illegal, and the ensuing line-up identification while appellant was still illegally detained should have been suppressed and excluded from evidence.

2. The verdict of guilty in which only nine out of twelve jurors concurred denied appellant due process and equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

Twenty-five bills of exceptions were reserved in this matter. However, before argument in this Court, counsel for the defendant stated that all bills taken at trial were without merit. Therefore, contrary to our usual format in writing a criminal case, herein infra we shall only consider the specification of errors urged supra.

The testimony taken on the hearing of the motion to suppress and on trial discloses in substance the following account of defendant's arrest, booking, line-up, the incidents of the crime charged, and the actions of the victim following his being robbed by an armed man:

On December 26, 1967, at approximately 3:30 P.M., (the weather was clear and the sun was shining) Eugene Frischertz, a route salesman for Coca Cola Bottling Company, had just made a delivery at Brown's Grocery, 2139 Third Street, New Orleans, Louisiana, when a man, whom he saw from the mirror of his truck (there was a mirror on the right side and on the left side of the front of the truck), approached the door of the truck, brandished a revolver at him and demanded that he give him all of his money.[1] Frischertz gave the robber between $500.00 and $600.00 of money belonging to Coca Cola Bottling Company and $31.00 of his own money, and the robber fled. Frischertz reentered the grocery store and summoned the police; they arrived within approximately fifteen minutes, and Frischertz related the details of the robbery and gave them a complete description of the robber—weight, hair and clothing. Later, Frischertz went to the Detective Bureau where he was shown mug shots of suspects; he did not identify any of the pictures as being that of the defendant, but he pointed out characteristics—build and facial make-up—of the robber similar to those of the parties appearing in the mug shots. Thereafter, at a line-up, which we shall discuss infra, he identified the defendant as the man who had robbed him.

The robbery of truck drivers was prevalent in the City of New Orleans at the time Frischertz was forcibly robbed. The police were conducting an investigation for the purpose of arrest, and Lieutenant Theodore Feld, New Orleans Police Department, Detective Bureau, Robbery Division, was in charge. On the hearing of the motion to suppress, Lt. Feld testified:

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[1] Frischertz was seated on the right side of the truck by the door; he was accompanied by two helpers, one of whom drove the truck.

"A. On the 18th of January we received information from a confidential informant—I didn't receive it—my superior, Captain Newman received it from one of his informants that Frank Johnson and Hayes, Harold Hayes—

[Colloquy]

"A. Saying that these two subjects were involved in an armed robbery of truck drivers. So I sent one of the men over to the B of I to get photographs on subjects by the name of Harold Hayes and Frank Johnson in a group and have one of the men bring it to one of the victims who was employed by the Brown's Velvet. The man looked at the pictures and identified Frank Johnson and also a photograph of Harold Hayes. He initialed the same with the date and then that gave us probable cause to arrest him. The man positively said that was the man that held him up."

Marion Catalano, an employee of Brown's Velvet Ice Cream, Inc., had been the victim of about three armed robberies; he identified defendant's photograph as that of a man who had committed a robbery on him. At Lt. Feld's instruction, Detective John Lanza secured the photograph identification. This was done shortly after Captain Newman, Assistant Chief of the Detective Bureau, communicated to Lt. Feld the information given to him by an informant, January 18, 1968.

On January 20, 1968, at approximately 6:00 A.M., Lt. Feld and Sgt. Lawrence John Vigurie arrested the defendant at his residence, 2135 Philip Street, New Orleans, Louisiana, for the robbery of Brown's Velvet Ice Cream, Inc. truck driver Catalano, but at the time of arrest Lt. Feld was not specific with the defendant; six officers were involved in the arrest. Lt. Feld testified that he knocked on Johnson's front door and was admitted by Mrs. Johnson and a male other than Johnson; that they were shown the officers' identification and told that the officers were looking for Frank Johnson. Defendant was taken from under his bed by Sgt. Vigurie,

who told him that he was being placed under arrest for armed robbery; he was allowed to get dressed and was then handcuffed. Lt. Feld did not have an arrest warrant, but he testified that there was no reason for not securing one.

A search was made of the defendant's house, but we are not herein concerned with any fruits of the search. The issue of search and seizure connected with an arrest is not an issue herein involved.

Defendant was brought to the Detective Bureau at approximately 6:45 A.M., where he was apprised of his constitutional rights [2] and then interrogated. A short time later he accompanied and assisted the officers in the arrest of a suspect. He was returned to the Detective Bureau about mid-morning and then booked with a number of armed robberies.[3] Lt. Feld testified, "Catalano was the original booker and that is what we went out there to arrest him on."

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[2] On hearing of the motion to suppress, defendant testified:

"Q. Did they then come in to ask you if you wanted to make any statements?

"A. Yes, sir. About twenty, twenty-five minutes later they came into me and they read off of a piece of paper something to the fact pertaining to the fact that they advised me of my rights, and I told them I didn't want to make any statements; I didn't have anything to say.

"Q. Did you sign such a piece of paper, an arrestee form or anything like that?

"A. Yes, I signed the form that they had, notified me of my rights as an arrestee."

The records contain a form, *Rights of an Arrestee or Suspect*, January 20, 1968, 7:10 A.M.; it is signed by Det. John J. Lanza, and the statement is made that Sgt. Larry Vigurie was present. The form contains a check mark by the notation, *Refused to Sign;* this notation appears under the signature of the arrestee or suspect, which in this case is blank.

[3] On hearing of the motion to suppress, defendant testified: "Yes, sir; about four and a half, about five hours later on that evening they came back. They came upstairs and brought us back downstairs and they rebooked us with another armed robbery, and about fifteen minutes later, maybe ten, they rebooked us with another armed robbery."

A line-up was held at the Detective Bureau on January 23, 1968, and victims of all truck driver holdups in the location herein involved were requested to attend. Eugene Frischertz, the instant victim, was present and, as stated supra, identified defendant as the man who had robbed him on December 26, 1967. The testimony of Frischertz is in part as follows:

"Q. Now, let's get to the line-up, Mr. Frischertz: What happened at the line-up, tell us about it in your own words?

"A. I identified this man as being the man that held me up.

"Q. Did you identify him by a number?

"A. No.

"Q. If I showed you a picture, would it refresh your recollection: Is that the line-up?

"A. Yes, sir.

"Q. Were there a number at that date?

"A. There were.

"Q. I ask you if: Did you identify them by number?

"A. I did not. I identified him, then picked the number.

"Q. But you did identify by number?

"A. Not by number. I identified his face.

"Q. And then tied a number in with it?

"A. Right.

"Q. But there was always a number around his neck, correct?

"A. Right.

"Q. And that number was four?

"A. Right.

"Q. And did you identify him as to position in the line-up?

"A. No.

"Q. Do you know how many persons were in the line-up: I just showed it to you?

"A. Seven.

"Q. Who was the middle man?

"A. The middle man?

"Q. Yes. Number four—three on one side and three on the other—who was the middle man?

[Colloquy, and objection sustained.]

"* * *

"Q. When you saw him, you immediately recognized him, is that correct?

"A. I did.

"Q. No officer was sitting beside of you prompting you?

"A. No.

"Q. No one had made any suggestions to you at the Detective Bureau?

"A. No."

Rene Belsom, a patrolman employed in the Bureau of Identification, having as one of his primary duties the taking of photographs, testified that he took a line-up picture on January 23, 1968. He identified S-1 offered in evidence as the picture he had taken; it is a line-up pose of seven men with defendant appearing as No. Four.

Byron Legendre, an attorney connected with Legal Aid, was present at the line-up of January 23, 1968. He testified:

"I went over to the Federal Lockup [Orleans] and interviewed a number of people who were booked at that time with the crime of armed robbery. I interviewed them on this premise: Whether or not they had a counsel or a lawyer of their own at that time and for those who said they did not, I told them that I would be available as their attorney for the purpose of the line-up alone to make sure that they got a fair line-up, and Number Two, to be able to report to their attorneys at a later date as to what transpired at that line-up. And to each of these men I gave my card if I had one available and to each of them I promised I would let them know the results of the line-up after it was finished. Mr. Johnson was one of these men who said he did not have counsel."

Mr. Legendre further stated:

> "These people are instructed by me, the suspects, are instructed by me to make a choice of the number they wish: They can stand next to whom they please. And the numbers are so chosen and then the rest of the people are handed out the numbers. Only the suspects get a choice of what number they want: They don't get a choice of who they stand next to. Once they have their numbers and the other numbers are given out, they are placed against the wall and then I have an opportunity to let the police know my appreciation of what I see."

Lt. Feld testified that Mr. Legendre represented the defendant at the line-up. On the hearing of the motion to suppress, defendant himself testified that he went to a line-up on January 23, 1968. He said that he had an attorney—he thought that he was Mr. Legendre from Legal Aid. He stated that the attorney represented him at the line-up and talked with him before same was held, advising him of his rights.

On February 14, 1968, a bill of information was filed against the defendant. He was charged with a violation of LSA-R.S. 14:64, in that "while armed with a dangerous weapon, to wit: a pistol, robbed one EUGENE FRISCHERTZ of Six Hundred and Thirty-One ($631.00) Dollars in United States Currency, * * *"

## SPECIFICATION OF ERRORS NO. 1

In this Court, counsel for the defendant urge:

A. The arrest was illegal because the arresting officer did not himself have the probable cause required of warrantless searches under the Louisiana and United States Constitutions.

B. The arrest of appellant was illegal because the arresting officer intentionally declined to obtain a warrant so that he could search "incidental" to the arrest.

C. The identification of appellant at a line-up after his illegal arrest, and while still illegally detained should have been suppressed and all evidence pertaining to it excluded at trial.

In Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441, (1963) the United States Supreme Court said:

> "* * * It is basic that an arrest with or without a warrant must stand upon firmer ground than mere suspicion, see Henry v. United States, 361 U.S. 98, 101, 80 S.Ct. 168, 170, 4 L.Ed.2d 134, though the arresting officer need not have in hand evidence which would suffice to convict. The quantum of information which constitutes probable cause—evidence which would 'warrant a man of reasonable caution in the belief' that a felony has been committed, Carroll v. United States, 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 543—must be measured by the facts of the particular case. * * *
>
> "Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained. * * *
>
> "* * * We have held that identification of the suspect by a reliable informant may constitute probable cause for arrest where the information given is sufficiently accurate to lead the officers directly to the suspect. Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327. * * *"

In the Henry Case mentioned above, 80 S.Ct. at 171, (1959) the United States Supreme Court said:

> "Evidence required to establish guilt is not necessary. * * * On the other hand, good faith on the part of the arresting officers is not enough. Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed. * * * It is important, we think, that this requirement be

strictly enforced, for the standard set by the Constitution protects both the officer and the citizen. If the officer acts with probable cause, he is protected even though it turns out that the citizen is innocent. * * *"

In Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436, (1948) the United States Supreme Court was in essence considering the legality of a search, but with respect to arrest it stated:

"The Government contends, however, that this search without warrant must be held valid because incident to an arrest. This alleged ground of validity requires examination of the facts to determine whether the arrest itself was lawful. Since it was without warrant, it could be valid only if for a crime committed in the persence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty."

"Probable cause has been defined as a reasonable grounds for belief of guilt. It exists where the facts and the circumstances within the officer's knowledge are sufficient in themselves to warrant a man of reasonable caution in the belief than an offense has been or is being committed. Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543; Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879." State of Louisiana v. Walker, 206 F. Supp. 544, Cert. Denied, 371 U.S. 957, 83 S.Ct. 514, 9 L.Ed. 504, (1963).

"An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement whether or not trial or conviction ultimately follows." Terry v. State of Ohio, 392 U.S. 1, 88 S.Ct. 1868, 1882, 20 L.Ed.2d 889, (1968). Cf.

Sibron v. State of New York, 392 U.S. 40, 88 S. Ct. 1889, 20 L.Ed.2d 917.

"A case of arrest without a warrant necessitates striking a balance as to (a) considerations respecting the rights of the individual citizen taken into custody, and (b) consideration respecting the responsibility of police officers for the safety and security of all members of the community; *i.e.*, the propriety of law enforcement or police action. It is a problem of value judgment. The test, purely and simply, is one of reasonableness, considering the time, the place, and the pertinent circumstances." Plancich v. Williamson, 57 Wash.2d 367, 357 P.2d 693, 92 A.L.R.2d 559.

"* * * That the officer had time to have obtained a warrant and failed to do so does not make an otherwise legal arrest or legal search and seizure illegal. Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145." State of Louisiana v. Walker, 206 F.Supp. 544, 546.

In Louisiana an arrest by an officer without a warrant may be made when "the peace officer has reasonable cause to believe that the person to be arrested has committed an offense although not in the presence of the officer." LSA-C.Cr.P., Art. 213(3). "The law has not ordained hard and fast rules for the determination of reasonableness. The facts and circumstances of each case must be judged separately, with wide latitude accorded the trier of facts. That determination should not be overturned unless there is clear error." State v. McIlvaine, 247 La. 747, 174 So.2d 515, 520. Cf. State v. Aias, 243 La. 946, 149 So.2d 400; State v. Christiana, 249 La. 247, 186 So.2d 580; State v. Pagnotta, 253 La. 770, 220 So.2d 69; State v. Devenow, 253 La. 796, 220 So.2d 78. "* * * the Government has the burden of showing probable cause to believe that a crime had been or was being committed both in obtaining a warrant prior to arrest and in sustaining the legality of an arrest without a warrant. * * *" United States v. Rivera, 321 F.2d 704. Cf. Beck v. State of Ohio, 379 U.S. 89,

85 S.Ct. 223, 13 L.Ed.2d 142; 6 C.J.S. Arrest, Sec. 5 a., p. 580.

We find that defendant's arrest was legal. At the time of his arrest armed robberies were widespread in the City of New Orleans. The facts supra disclose that Captain Newman had informants on whom he relied. One confidential informant conveyed reliable information to him, and this information pointed out the defendant as having committed some of the then recent truck driver robberies. The information was immediately relayed to Lt. Feld who trusted and believed his superior officer. The Lieutenant was alert to the tense situation existing among truck drivers handling money receipts. Sgt. Vigurie was a co-worker with Lt. Feld. There was a chain of command, which is usual for all large operations whose procedures are intricate, involving many police officers; six officers were detailed to the instant arrest.

A prudent man of reasonable caution, considering the time, place, and pertinent circumstances,—and having the facts available to him which Lt. Feld had in his personal possession and immediate knowledge (although they might not have been written on papers on his person)—would, in our opinion, have certainly believed that the defendant was guilty of armed robbery. Again, in our opinion, there would have been more than suspicion. Substantiating this conclusion is the fact that Marion Catalano, the Brown's Velvet driver, had identified a mug shot of the defendant as that of the man who had robbed him.

We conclude that Lt. Feld, Sgt. Vigurie, and the other officers—under the totality of the circumstances—acted under more than good faith and suspicion; they had probable cause to arrest the defendant. There was no reason why a warrant of arrest could not have been secured, but the failure to secure the warrant did not invalidate defendant's arrest. State of Louisiana v. Walker, supra.

The officers did not break into defendant's home; there was no forceful entry; they were admitted by defendant's wife. Therefore, the entry was legal. Cf.

Sabbath v. United States, 391 U.S. 585, 80 S.Ct. 1755, 20 L.Ed.2d 828, (1968).

When arrested, defendant was told that he was being arrested for armed robbery. This statement was sufficient to apprise him why his freedom of movement was suffering an interference.

We find that the State bore its burden of proving that defendant's arrest was constitutional and legal, and that there was probable and reasonable cause for such. The sum total of the facts and circumstances of this prosecution more than warrant such a conclusion. United States v. Elgisser, 334 F.2d 103, (1964).

The fact that defendant was booked some four hours after he was arrested does not make his arrest illegal. As stated supra, he was interrogated, but none of his statements were introduced in evidence. Defendant suffered no deprivation of his constitutional rights.

Having found that the defendant was legally arrested, we proceed to a determination of the constitutionality vel non of the instant line-up. When the line-up occurred, defendant was in legal custody and under no arrest. We find no impairment, Federal or State, to a line-up conducted under constitutional standards. Here, as stated supra, defendant was represented by able counsel at a critical stage of his prosecution; there was no prohibited self incrimination.[4]

"We have no doubt that compelling the accused merely to exhibit his person for observation by a

[4] "Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution at which he was 'as much entitled to such aid [of counsel] * * * as the trial itself.' Powell v. State of Alabama, supra, 287 U.S. at 57, 53 S.Ct. at 60, 77 L.Ed. 158. Thus both Wade and his counsel should have been notified of the impending lineup, and counsel's presence should have been a requisite to conduct of the lineup, absent an 'intelligent waiver.' See Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 834, 8 L.Ed. 2d 70. * * *" United States v. Wade, 87 S.Ct. at 1937, (1967).

prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have. It is no different from compelling Schmerber to provide a blood sample or Holt to wear the blouse, and, as in those instances, is not within the cover of the privilege. Similarly, compelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber, was not compulsion to utter statements of a 'testimonial' nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt. * * *" United States v. Wade (1967) 388 U.S. 218, 87 S.Ct. 1926, 1930, 18 L.Ed. 1149.

We conclude that the pretrial line-up herein was legal, and that the picture of the line-up (S-1), which includes as No. Four the photograph of the defendant, was properly admitted in evidence. We further find that evidence of the pretrial line-up identification by the victim was properly admitted in evidence. There was no need for suppression.

The record also discloses that there was an in-court identification at trial. The testimony with respect to this identification is as follows:

"Q. Do you [victim] see this person in Court today?
"A. I do.
"Q. Would you point him out, please?
"A. That gentleman right there (indicating).
"Q. Is this the same gentleman that held you up on December 26, 1967?
"A. It is."

Defendant suffered no violation of his constitutional rights by either the pretrial line-up identification or by the in-court identification. The trial judge was correct in admitting such in evidence. Cf. State v. Allen, 251 La. 237, 203 So.2d 705; State v. Miller, 254 La. 73, 222

So.2d 862; State v. Lewis, —— La. ——, —— So.2d ——.

Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969), is not apposite to the instant matter. No legal arrest was involved in that case. The United States Supreme Court distinctly said, "The legality of his arrest was not determined by the Mississippi Supreme Court." The Court then held the fingerprints taken during a period of detention unconstitutional evidence which could not be admitted during trial.

Specification of Errors No. 1 is without merit.

## SPECIFICATION OF ERRORS NO. 2

We find no merit in Specification of Errors No. 2 which contends that the verdict of guilty in which only nine out of twelve jurors concurred denied appellant due process and equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

Article 782 of the Code of Criminal Procedure provides:

> "Cases in which the punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which the punishment is necessarily at hard labor shall be tried by a jury composed of twelve jurors, nine of whom must concur to render a verdict. Cases in which the punishment may be imprisonment at hard labor, shall be tried by a jury composed of five jurors, all of whom must concur to render a verdict. * * *"

The Sixth Amendment to the United States Constitution provides that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the ac-

cusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Thus far, the United States Supreme Court has not ruled that the Sixth Amendment compels the States under the Fourteenth Amendment to the United States Constitution to require that the verdict of the jury be unanimous in a criminal prosecution such as the instant one. Herein, therefore, our ruling in State v. Schoonover, 252 La. 311, 211 So.2d 273, which upheld the ruling of the trial judge refusing to charge the jury that, "The verdict of the Jury, either to acquit the defendant or to convict him [armed robbery] must be by the unanimous vote of the entire jury," is applicable. In Schoonover we said, "These arguments do not impress us. We are entirely satisfied that the Constitution and laws of our state provide a system for this prosecution in which fundamental fairness and even-handed justice can be and was dispensed. * * *" We are still of the same belief.

Specification of Errors No. 2 is without merit.

For the reasons assigned, the conviction and sentence are affirmed.

* * * *

# IN THE SUPREME COURT OF THE STATE OF LOUISIANA

No. 49,861

STATE OF LOUISIANA, APPELLEE

*vs.*

FRANK JOHNSON, APPELLANT

## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Frank Johnson, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Louisiana affirming the judgment of conviction, entered herein on January 20, 1970.

This appeal is taken pursuant to 28 USC § 1257(2).

/s/ Richard A. Buckley
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SUPREME COURT OF THE UNITED STATES

No. 5161, October Term, 1970

FRANK JOHNSON, APPELLANT

*v.*

LOUISIANA

ON CONSIDERATION of the motion of the appellant for leave to proceed in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

November 9, 1970

SUPREME COURT OF THE UNITED STATES

No. 5161, October Term, 1970

FRANK JOHNSON, APPELLANT

*v.*

LOUISIANA

APPEAL from the Supreme Court of the State of Louisiana.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

November 9, 1970

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 5161

FRANK JOHNSON,

*Appellant,*

v.

LOUISIANA,

*Appellee.*

APPEAL FROM THE SUPREME COURT OF LOUISIANA

## APPELLANT'S BRIEF


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## TABLE OF AUTHORITIES CITED

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Kalven, Harry, Jr. and Zeiger, Hans, *The American Jury*, (Boston: Little, Brown & Co., 1966) . . . . 7-8, 11-12, 14-15, 18

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

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No. 5161

---

FRANK JOHNSON,

*Appellant,*

v.

LOUISIANA,

*Appellee.*

---

APPEAL FROM THE SUPREME COURT OF LOUISIANA

---

## APPELLANT'S BRIEF

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*May It Please the Court:*

### THE OPINION BELOW

The opinion of the Supreme Court of Louisiana is reported at ____ La. ____, 230 So.2d 825 (1970).

### JURISDICTION

This is an appeal from the Supreme Court of Louisiana, the highest Court of the State of Louisiana. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (2) and (3) since this case involves both the constitutional valid-

ity of a Louisiana Constitutional and statutory provision as well as a claimed right under the United States Constitution.

## THE ISSUES PRESENTED

1.

Does a state statute that denies a defendant the benefit of a unanimous verdict while extending that benefit to defendants charged with both lesser and greater crimes deny such defendant equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution?

2.

Does a state statute that provides for conviction by a majority verdict fail to satisfy the requirement of the due process clause of the Fourteenth Amendment to the United States Constitution that a defendant not be convicted except on a finding of guilt beyond a reasonable doubt?

3.

Is a warrantless arrest illegal and is the line-up identification evidence obtained during the subsequent detention inadmissible when the arresting officers admit that they had ample opportunity to secure an arrest warrant but failed, refused, or neglected to do so?

## STATEMENT OF FACTS

Frank Johnson, Appellant herein, is a Negro citizen of the United States, and a resident of Orleans Parish, Louisiana. Before dawn, on January 20, 1968, Appellant was asleep in his home. Also sleeping in Appellant's home were members of his family and a friend, Harold Hayes. (Tr. 172-173)[1] All of the occupants in the home were sud-

[1] Tr.—indicates the pages of the Trial Transcript. The Appendix has not yet been printed so that Appellant may assign its page numbers herein.

denly aroused by the entry of six men armed with shotguns who indicated they were police officers. (Tr. 172, 210) The officers did not possess a search warrant nor an arrest warrant, even though they planned to conduct a search of Appellant's home. (Tr. 202, 208) Lt. Field, officer in charge of the seizure of Appellant, testified that there was no reason for failing to secure an arrest warrant or a search warrant. (Tr. 208-209) Lt. Field indicated that the police went to Appellant's home to arrest Appellant for a robbery of a Mr. Catalano, although the officer did not know on what date or where the robbery had occurred. (Tr. 206-207)

Lt. Field testified that the probable cause to arrest was the identification by Mr. Catalano of two subjects (Frank Johnson and Harold Hayes) from mug shots as the persons who had robbed him. (Tr. 203) Before arresting Appellant in his home, Appellant was shown the police photograph and asked whether the photograph was his picture. (Tr. 176-177) Appellant was asked whether he was in fact Frank Johnson. *(Ibid.)* The police did not know that the other suspect, Harold Hayes, was the person who had stated he was Appellant's brother when the police entered Appellant's home. (Tr. 213-214) The police conducted a thorough search of Appellant's home but did not find the evidence they were seeking. (Tr. 211-213)

Four or five hours subsequent to his arrest, Appellant was booked for the armed robbery of Mr. Catalano. (Tr. 217) On January 23, 1968, Appellant was placed in a line-up which was described by Lt. Field as follows (Tr. 218):

> Q. Was this defendant identified at that lineup? A. He was identified.
>
> Q. He was identified by one of the victims? A. Yes, sir.
>
> Q. By one of the victims that you went out to arrest him for? A. Well, when we had the lineup, we went through our files and got victims of all

> truck driver holdups in that location and requested them to come back to view the lineup. He was identified by one of those victims, and then that is when he was charged on this charge.

Mr. Catalano, the person who Lt. Field testified had furnished the information for probable cause, did not make the identification of Appellant. A person by the name of Eugene Frischertz, who was the victim of another robbery on December 26, 1967, made the identification of Appellant. (Tr. 252)

Appellant was tried before a jury of twelve on May 15, 1968 (Tr. 4) and a majority of the jury (9 for, 3 against conviction) found him guilty as charged. (Tr. 79)

Appellant appealed to the Louisiana Supreme Court from his conviction, assigning, among others, the errors urged herein. The Louisiana Supreme Court heard and passed upon these questions, deciding them unfavorably to Appellant herein. Appellant subsequently filed his Jurisdictional Statement in this Court in April of 1970 and on November 9, 1970, this Court noted probable jurisdiction of this appeal.

## ARGUMENT

### PREAMBLE TO POINTS I AND II.

This case arose before this Court decided *Duncan v. Louisiana*, 391 U.S. 145 (1968). The decision of this Court in *DeStefano v. Woods*, 392 U.S. 631 (1968), holding that *Duncan* is not retroactive, removes from consideration here the *Duncan* holding that a defendant in a State trial for a serious offense is entitled to a jury trial of the same nature as he would be provided in a Federal Court. Appellant recognizes this limitation and does not rely upon the *Duncan* holding here.

But Appellant does not feel that the opinion of this Court in *DeStefano* precludes him from arguing here that he is entitled not to be convicted on a jury verdict of less

than the whole number of jurors—whether or not this Court in the future finds that the requirement for unanimity is included in the Sixth and Fourteenth Amendment guarantee of a jury trial. Appellant is not arguing that the right of a jury trial provides him the right to a unanimous verdict—although he would do so but for this Court's holding in *DeStefano.*

Nothing said in *Williams v. Florida,* 398 U.S. ___ (1970), holding that the Constitution permits a trial by fewer than the twelve jurors required at common law, impels a conclusion different than that urged herein by Appellant. *Williams* was an interpretation of *Duncan,* which as aforesaid is not here relied upon; moreover, this Court said in *Williams* that it did not consider the question of unanimity in the jury verdict. 398 U.S. at___, n. 46.

Appellant's first argument here is that because the State of Louisiana provides to defendants charged with both greater and lesser offenses the right to a unanimous verdict, the State cannot deny to defendant the right to such a verdict. Appellant urges that there is no rational basis for the distinction between defendants in his class and those charged with both greater and lesser offenses. Appellant's second argument that he is entitled not to be convicted and deprived his liberty except upon a verdict rendered by a unanimous jury is based upon what he shows hereinbelow to be the fact that a verdict rendered by fewer than the whole number of jurors fails to meet the constitutional standard of proof beyond a reasonable doubt. It seems that proof to a majority of jurors, even though such proof has to them been "beyond a reasonable doubt," is still only a variation of the "preponderance of the evidence" test since it is but a preponderance of the jurors who feel that guilt has been proved beyond a reasonable doubt in cases where the whole does not agree that the constitutional standard of proof has been met by the prosecution.

## I.

### ARTICLE 782, La C.Cr.P. AND ARTICLE VII, SECTION 41, La. CONST. OF 1921, DENIES TO PERSONS IN APPELLANT'S CLASS THE EQUAL PROTECTION OF THE LAWS

Appellant's class consists of all persons charged with crimes necessarily punishable with imprisonment at hard labor, who have been convicted of such crimes upon the basis of a majority, as opposed to a unanimous, verdict. Art. VII, § 41, La. Const. of 1921 and Art. 782, La. C.Cr.P., both permit such a conviction. The difference in treatment between persons in Appellant's class and those in the other two relevant classes (capital charges are triable only by a 12-man jury *requiring a unanimous verdict*; and, charges, the conviction for which only "may" result in imprisonment at hard labor, are triable by a jury of five *requiring a unanimous verdict*) has no rational basis. The Louisiana Supreme Court has stated that "the purpose, and the only purpose, of the framers of the [Louisiana] Constitution, in providing the different methods of trial thus mentioned, was to facilitate, expedite, and reduce expense in the administration of criminal justice." *State v. Lewis*, 129 La. 800, 56 So. 893, 894 (1911). No reason is given why the jury sitting in a case such as Appellant's should not be required to reach a unanimous verdict when lesser grade offenses require this right. This Court, in *Williams*, held that "the reliability of the jury as a fact finder hardly seems likely to be a function of its size." 398 U.S. at . Therefore, the larger number of jurors, when the quality of their verdict—unanimous agreement—is diminished, cannot serve as a rational basis for retaining in the small jury that quality of certainty reflected by the unanimous verdict while rejecting it in the more serious cases.

The function of a jury is to find the facts in a case and, sometimes, to assess punishment. In Louisiana, the jury may assess punishment in capital cases by withholding from its verdict the qualifying phrase, "without capital punish-

ment." Sentence to death is then mandatory. Art. 817, La. C.Cr.P. But this function of assessing punishment is not unique to the capital jury. In almost all cases, the jury may limit the assessment of punishment by finding one guilty of a lesser included offense. See Art. 814, La. C.Cr.P. The requirement for unanimity in the 12-man capital jury's verdict cannot be based upon its ability to assess punishment because, in effect, all juries have this ability. If unanimity of the verdict is required in capital cases to assure more certitude in the finding of a verdict, then it seems unreasonable that such a quality in the verdict should be denied to persons in Appellant's class. The constitutional standard, reasonable doubt, is required in all criminal cases.

A very good article has been written on the subject of the dynamics of jury decision-making: Note, "On Instructing Deadlocked Juries," 78 Yale L.J. 100 (1968). That article describes the internal techniques of decision making, *i.e.*, the means by which unanimity is reached by the jury, as "coalition pressure" and "verbal pressure." Coalition pressure depends upon the relative number of jurors in each opposing group; "such pressures are most effective against a single dissenter and fall off rapidly in efficacy as the size of the dissenting coalition increases." *Id.* at p. 110. Verbal pressure depends upon the willingness and ability of each opposing group to express its views. When each opposing group is willing and able to express its views, each side will do an equal amount of talking and remain in balance. When the smaller faction tires of talking, one or more of its members will usually be converted to the majority view. The process of jury deliberation and the effect of these internal "pressures" is best shown in statistics collected on hung juries.

Under a grant from the Ford Foundation, a study on the jury system was done at the University of Chicago. That study resulted in the publication of the book, Harry Kalven, Jr. and Hans Zeiger, *The American Jury* (Boston:

Little, Brown & Co., 1966). Statistics are collected and analyzed in Chapter 36, *id.*, "The Hung Jury", pp. 453-463. The study of the University of Chicago by the group hereafter referred to as the "Jury Project" was conducted in a rather unique manner. Five hundred and fifty-five judges were asked to fill out questionnaires in 3,576 cases. The judges were asked to supply details by which the nature of the reasons for the jury's determination could be ascertained. It was found that the judge and jury agreed upon the appropriate verdict in 78% of all cases. Table 120, *id.* at p. 456, shows that in 71% of the cases in which a jury was unable to return a verdict, their disagreement was based upon evidence factors. Table 58, *id.* at p. 186, shows that the reason for the disagreements between judges and jurors in all cases (22% of all the cases studied) was based upon the jury having a higher standard of reasonable doubt. This will be more fully explored in the arguments under Point II, *post.* Table 127, *id.* at p. 462, shows that in all the cases studied, where there are only two or three jurors voting for acquittal on the first ballot, a verdict was reached in all cases. The table further shows that where one juror voted for conviction on the first ballot, the jurors reached a verdict in all cases. Where only two or three jurors voted on the first ballot for conviction, a verdict was reached in 97% of the cases. The significant part of Table 127 in regard to the instant case, however, is the group of jurors ranging from four to eight voting initially for acquittal. In those cases, the jury were able to agree upon a verdict in only 85% of cases, thus leaving a margin of three in twenty cases in which the jury were unable to agree. These figures substantially support the conclusions drawn in the Note, "On Instructing Deadlocked Juries," *op. cit.*, that juries are less likely to succumb to coalition pressures of the majority as the size of the minority increases.

It thus becomes immediately obvious that both coalition and verbal pressures will operate differently when on the one hand a jury must find a unanimous verdict, and on

the other, when its final decision can be less than unanimous. When there are eight of twelve jurors for conviction on the first ballot, the statistics compiled by the Jury Project teach us that the jury will reach a uniformity of opinion only 85% of the time; whereas, when the first ballot has one more for conviction, the jury will always agree. Coalition pressure is not adequate to turn around a minority of four or more jurors a substantial amount of the time.

Table 125, *The American Jury*, p. 460, shows that after unsuccessful attempts to reach unanimous agreement in the jurors' verdict, more than half of the cases that would result in mistrial in jurisdictions requiring a unanimous verdict would be resolved by a verdict in Louisiana. The relevant parts of Table 125 are set out as follows:

Last Vote Of Hung Juries

| Votes for Conviction | Per Cent |
|---|---|
| 11:1 | 24 |
| 10:2 | 10 |
| 9:3 | 10 |
| * * * * * | |
| 3:9 | 4 |
| 2:10 | 8 |
| 1:11 | – |

Totalling these figures, 44% of the juries which would hang in other jurisdictions would convict in Louisiana. Twelve per cent of these juries would acquit. Thus, 56% would reach a verdict when, were unanimity required, they would hang. And Table 126, *id.* at p. 461, further shows the disparity in jurisdictions where unanimity is required and those where it is not. A mistrial occurs in jurisdictions where unanimity is not required only 55.3% as frequently as in those where it is required. This difference in frequency is substantial and permits the conclusion that in those close cases where there is a lack of unanimous agreement by the jury, the likelihood that one will be convicted is nearly twice as great as in those jurisdictions where un-

animity is required. Since Louisiana has both, unanimous and majority-verdict juries, it is evident that the likelihood of conviction in a close case is much greater in the type jury trial had by Appellant as opposed to that had by persons charged with both greater and lesser offenses. Appellant respectfully contends that he was denied equal protection of the laws because the denial of the requirement for a unanimous verdict increased the likelihood of his conviction.

There are no statistics gathered for the five-man jury requiring a unanimous verdict. It must be conceded, however, that uniformity of opinion in a group having different backgrounds and experiences—such as juries are supposed to be—is always harder to reach than a three-quarters majority opinion. It would be much easier to get three jurors to agree when the jury consists of four than it would to get all to do so. Yet, the State of Louisiana has not seen fit to reduce the quality of the verdict in five-man juries. *Williams'* teaching that factfinding reliability is not a function of the number of deliberators should apply to the contrast between the quality of verdicts in a jury trial such as that had by Appellant and one by a jury of five requiring uniformity of opinion.

It is an irrational and arbitrary classification that would deprive defendants charged with more serious offenses a benefit or right automatically accorded to those charged with lesser offenses. See *Staph v. United States,* 125 U.S. App. D.C. 100, 367 F.2d 326, 328 (1966). Louisiana's scheme of trial by jury does deny to defendants charged with more serious offenses the right to a unanimous verdict which is automatically accorded to all persons tried for lesser grade felonies in Louisiana. This distinction in treatment denied to Appellant the equal protection of the laws guaranteed to him by the Fourteenth Amendment to the United States Constitution.

Moreover, as shown in the arguments under Point II, *post,* the unanimity requirement of the jury verdict is a

necessary element of the constitutional standard of guilt determination: proof of guilt beyond a reasonable doubt. *In re Winship,* ____ U.S. ____ (1970). Before the State may make distinctions in the treatment of its citizens on trial for criminal offenses, it must show a "compelling" interest in discarding the requirement for unanimity in the jury verdict. *Shapiro v. Thompson,* 394 U.S. 618 (1969), teaches that where a classification touches on a fundamental constitutional right, the constitutionality of the classification "must be judged by the stricter standard of whether it promotes a *compelling* state interest." 394 U.S. at 638. If it does not, it violates the Equal Protection Clause of the Fourteenth Amendment. *Ibid.* The only interests promoted by Louisiana's jury trial scheme, as stated by its highest Court, is "to facilitate, expedite, and reduce expense in the administration of criminal justice." *State v. Lewis, supra,* 56 So., at 894. Facilitation of proceedings does not promote a "*compelling* state interest" which justifies the diminution of the reasonable doubt standard of proof. It was easier before *Gideon v. Wainwright,* 372 U.S. 335 (1963), *Brown v. Mississippi,* 297 U.S. 278 (1936), *Miranda v. Arizona,* 384 U.S. 436 (1966), *Mapp v. Ohio,* 367 U.S. 643 (1961), and other such cases to convict a defendant. "Facility" had to succumb to the constitutional mandates not to deprive one of his liberty without due process and equal protection of the laws. The Constitution requires, and the state interest only allows the promotion of, orderly expedition and not mere speed in its proceedings. See *Powell v. Alabama,* 287 U.S. 45, 69 *et seq.* (1932). From the statistics derived from the Jury Project's survey (Table 123, *The American Jury,* p. 459), there is not a great deal of difference in the time spent deliberating in cases where a unanimous verdict is reached and those where the jury is determined to be hopelessly deadlocked. Certainly, Louisiana has no *"compelling"* interest that would allow it to dispose of its criminal cases more expeditiously than the forty-eight states which require unanimous verdicts of their juries. According to Table 122, *The Ameri-*

*can Jury*, p. 458, in only 12% of all cases in which the jury hangs does the deliberation exceed 10 hours. All of these cases involved trials lasting several days to over one week. The reduction of expense in the administration of criminal justice does not serve a compelling state interest which would allow the State to deny Appellant the right to a unanimous verdict. This Court has not held in the past that a discriminatory procedure in a criminal case may be applied on the basis of cost savings. See *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963), *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Cf. Smith v. Bennett*, 365 U.S. 708, 714 (1961); *Tumey v. Ohio*, 273 U.S. 510 (1927). And the avoidance of mistrials due to hung juries cannot serve as a rational basis for denying to Appellant the right to a unanimous verdict. Such a reason serves no basis for denying to one charged with a lesser or capital offense the right to a unanimous verdict. Louisiana's highest Court has even held that "the accused [has] the right to a mistrial in the event the jury could not agree." *State v. Rodman*, 208 La. 523, 23 So. 2d 204, 205 (1945). It is doubtful whether the avoidance of a mistrial could legitimately be a promotable state interest. The hung jury is a fundamental safeguard to liberty:

> I think a mistrial from a hung jury is a safeguard to liberty. In many areas it is the sole means by which one or a few may stand out against an overwhelming contemporary public sentiment. Nothing should interfere with its exercise.

*Huffman v. United States*, 297 F.2d 754, 759 (5 Cir. 1962); (Brown, C. J. dissenting), cited by a unanimous Court in *Green v. United States*, 309 F.2d 852, 854 (5 Cir. 1962). See, also, *Walker v. United States*, 342 F.2d 22, 27-29 (5 Cir. 1965) (Brown, C. J., dissenting); *Andrews v. United States*, 309 F.2d 127, 129 (5 Cir. 1962); (Wisdom, J., dissenting), *cert. denied*, 372 U.S. 946; *Thaggard v. United States*, 354 F.2d 735, 739-741 (5 Cir. 1965) (coleman, J., concurring), *cert. denied*, 383 U.S. 958; *Wil-*

*iams v. United States,* 119 U.S. App.D.C. 190, 338 F.2d 530, 533 (1964).

There being no legitimate promotable state interest at take, it is a denial of equal protection of the laws to dis-inguish between Appellant's class and the others in the equirement for unanimity of opinion by the jurors. This Court should therefore reverse the Appellant's conviction based upon a jury verdict by only nine of the twelve urors empaneled for his trial.

## II.

**ARTICLE VII, §41, LOUISIANA CONSTITUTION AND ARTICLE 782, LA.C.CR.P., PERMIT CONVICTION UPON LESS THAN THE CONSTITUTIONALLY REQUIRED REASONABLE-DOUBT STANDARD OF PROOF.**

In *In re Winship,* ___ U.S. ___, ___ (1970), this Court nequivocally stated that the government bears the burden f proving guilt *beyond* a *reasonable* doubt:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

*Winship,* this Court rejected the "preponderance of the idence" standard of guilt determination. ___ U.S. at —, ___ and accompanying text.

It is the respectful belief of the Appellant that a determination by a majority of a jury is closely analogous to finding of guilt upon a "preponderance of the evidence" st; it fails to find guilt upon the constitutionally required andard. Rather, it finds guilt upon the "preponderance" the opinion of the jury as to what constitutes proof yond a reasonable doubt.

There are varying degrees of doubt which are reasonable. Table 58, *The American Jury*, p. 186, graphically represents the difference of opinion as to the reasonable-doubt standard between the judges and juries studied by the Jury Project's survey. It is there shown that the unanimous jury has a higher threshold of reasonable doubt because, in order to attain uniformity of opinion, it must adopt the value of reasonable doubt possessed by its most stringent member. *The American Jury*, p. 189 n. 5. In contrast, the twelve-man non-capital jury in Louisiana must adopt only such value of reasonable doubt as its nine *least* stringent members possess. This constitutes a substantial difference in the burden of proof required to be met by the government between cases requiring a unanimous verdict and those requiring only a nine-twelfths majority verdict.

We must assume that jurors are reasonable men. Otherwise the jury system does not make sense. *Winship* teaches that the burden of proof required to be sustained by the State is proof *beyond* a reasonable doubt. It is virtually impossible that it could have been that Appellant was convicted upon proof *beyond* a reasonable doubt when three jurors had a reasonable doubt about his guilt. There was not that degree of certainty demonstrated by the jury in this case which is constitutionally required under *Winship*. There was but a "preponderance" rather than "beyond" a reasonable doubt standard of proof employed in the guilt determining process at Appellant's trial.

Louisiana's jury trial system, which allowed conviction upon less than a unanimous verdict, hence less than proof beyond a reasonable doubt, contravenes the Appellant's rights under the Fourteenth Amendment not to be deprived his liberty without due process of law.

> It is well to remember a major point about the legal requirement that for conviction there be proof beyond a reasonable doubt: it is the normative or value judgment expressed in this requirement. It is a way of saying that we live in a society that prefers to let ten guilty men go free rather than risk

convicting one innocent man. This is, to be sure, an almost heroic commitment to decency. In the end the point is that the jury, as an expression of the community's conscience, interprets this norm more generously and more intensely than does the judge. If a society wishes to be serious about convicting only when the state has been put to proof beyond a reasonable doubt, it would be well advised to have a jury system. Undoubtedly it was something of this sort that Lord Devlin had in mind when he said:

> Trial by jury is not an instrument of getting at the truth; it is a process designed to make it as sure as possible that no innocent man is convicted.

*The American Jury*, pp. 189-190 (footnotes omitted). The foregoing closely aligns with the comments of this Court in *Winship, supra*, _____ U.S., at _____:

> [U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof which leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

There can be no doubt but that the degree of certainty expressed by the jury's verdict differs in cases where the jury has reached a unanimous verdict and those where it has not. It is impossible that the majority verdict, then, does not represent a substantial dilution of the standard of proof required to be met by the State under *Winship*. In this case, at least three jurors were left with the knowledge that people can be convicted when there existed in their minds a reasonable doubt as to Appellant's guilt. If

the total of all the minority jurors could be determined who have voted to acquit a defendant who was convicted by a majority verdict, it is certain that there would be found to exist a substantial number of persons who *are* left in "doubt whether innocent men are being condemned." 398 U.S., at___. Moreover, Appellant and all those convicted by a majority verdict, as well as all those who are aware of their convictions, are convinced that "his government [can and does] adjudge [persons] guilty of a criminal offense without convincing a proper factfinder of [their] guilt with utmost certainty."

The standard of proof expressed by a majority verdict is intolerable in our system of criminal justice as reflected by this Court's opinion in *Winship* that before one may be convicted his guilt must be shown "beyond a reasonable doubt." This Court's holding in *Winship* gives meaning to the statement by the Sixth Circuit Court of Appeals in *Hibdon v. United States*, 204 F.2d 834, 838 (6 Cir. 1953) that the unanimous verdict is the indispensable element of due process of law in a jury trial. The teachings of these cases therefore condemn the majority verdict for want of that degree of certainty of guilt which is required by the Fourteenth Amendment before a jury may convict and deprive a man of his liberty.

Since this case arose before this Court decided the *Winship* case, it is necessary here to urge that the *Winship* teachings must be applied retroactively. In *Linkletter v. Walker*, 381 U.S. 618 (1965), this Court pointed out that in the cases where new constitutional rules were applied retroactively, "the principle we applied went to the fairness of the trial—the very integrity of the fact-finding process." 381 U.S. at 639. In *Stovall v. Denno*, 388 U.S. 293, 297 (1967), this Court said:

> The criteria guiding resolution of the question [of retroactivity of a new constitutional rule] implicates (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities upon the old standards, and (c) the effect

> on the administration of justice of a retroactive application of the new standards.

The purpose to be served by the new rule is the principle consideration. *Desist v. United States,* 394 U.S. 244, 249 (1969). When the purpose of the rule is not deterrence of official wrong-doing, but correction of a patent flaw in the fact-finding process, it should be given retroactive effect. *Linkletter v. Walker, supra.*

The requirement that guilt be proved beyond a reasonable doubt before one may be convicted of crime is not a new rule. Only the declaration of the rule's constitutional stature is new:

> The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The "demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, (though) its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1789. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt. [Citation omitted.] . . . (*Winship, supra,* at ____.)

There was no former rule construing the Constitution to have required anything but proof beyond a reasonable doubt before one could be convicted of crime. Therefore, there was no former standard upon which the State could have relied to determine that conviction by a majority verdict, hence by a lesser standard than proof beyond a reasonable doubt, was permissible. It is conceded that this Court has never considered the requirement for unanimity in the context of the reasonable-doubt standard of guilt-determination. But this fact does not weaken the case for retroactive application of the principle stated in *Winship;* it only points up the fact that there was no previous adjudication of this Court on which the State could have relied. Absent this basis for the State's provision relating to the type jury it provided persons within its jurisdiction

charged with crimes necessarily punishable by imprisonment at hard labor, the *Stovall* factor "(b)" does not favor only prospective application of *Winship* in the context here urged.

It is a well-known fact that most criminal matters that reach the formal accusation stage are resolved by plea-negotiation. Most of the persons imprisoned in Louisiana would not obtain a benefit from the retroactive application of *Winship* in the context here urged. In fact, in Louisiana, because it is such a well-known thing among the defendants and members of the bar that there is a greater likelihood of conviction in a case tried before a jury rendering less than a unanimous verdict, and because the law of Louisiana prohibits the waiver of trial by jury in favor of a bench trial in cases necessarily punishable by imprisonment at hard labor (Art. 780, La.C.Cr.P.), even more cases are resolved upon plea-negotiations than would be were there a right of trial by jury which could only report a unanimous verdict.

Even if it should be determined that the application of *Winship* in the context here urged would create a burden upon the administration of justice, it is urged that this burden would not be an undue one. Since the second criterion stated in *Stovall* does not favor only prospective application of the rule of *Winship*, it becomes a matter of balancing the purpose for the rule against the possible burden upon the administration of criminal justice in Louisiana and Oregon. The other States which allow conviction upon less than a unanimous verdict do so only in cases where the punishment does not exceed one year. See *The American Jury*, p. 189 n. 5. Since *Duncan v. Louisiana*, 391 U.S. 145 (1968), was decided more than a year ago, most if not all of the punishments imposed in trials in the other jurisdictions listed in note 5 above mentioned have been served. It is the respectful contention of Appellant that *Duncan* requires the verdict in State criminal trials to be unanimous because unanimity is the indispensable ele-

ment of trial by jury under the Sixth Amendment, *Hibdon v. United States, supra.*

This Court unequivocally stated the purpose for the reasonable-doubt standard of proof in criminal trials in *Winship:*

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock "axiomatice and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law." [Citation omitted] As the dissenters in the New York Court of Appeals observed, and we agree, "a person accused of crime . . . would be at a serious disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." [Citation omitted.]
>
> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. As we said in *Speiser v. Randall, supra,* 357 U.S. [513], at 525-526: "There is always in litigation a margin of error, representing error in fact-finding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden

> of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt." To this end, the reasonable-doubt standard is indispensable, for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue." [Citation omitted.]

When *Gideon v. Wainwright*, 372 U.S. 335 (1963), was made retroactive, this Court did not stop to consider the enormous number of convictions that were voided because of the high purpose for the rule of *Gideon*. See *McConnell v. Rhay*, 393 U.S. 2 (1969). The high purposes advanced by the rule of *Winship* are at least as important as those advanced by *Gideon*. It is respectfully submitted that the scales tip toward retroactive application of *Winship* since it is *impossible* that there could have been a fair trial when the State failed to satisfy the constitutionally imposed burden of proof (as reflected in the majority verdict of the convicting jury). It was only *probable* that a person had been denied a fair trial in the absence of counsel. In *Gideon*, this Court said: "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be *assured* a fair trial unless counsel is appointed for him." 372 U.S. at 344. In *Winship*, this Court held that a person *has not had* a fair trial when he has been convicted upon the basis of less than proof beyond a reasonable doubt.

This Court should determine that *Winship* is retroactive and, applying its principles to the instant case, it should reverse the Appellant's conviction and remand this case to the State court for proceedings not inconsistent with such an opinion.

## III.

**THE LINEUP IDENTIFICATION OF APPELLANT, UPON WHICH THIS CHARGE AGAINST APPELLANT WAS MADE AND UPON WHICH HIS CONVICTION IS BASED, WAS THE PRODUCT OF THE UNLAWFUL DETENTION OF APPELLANT, HENCE IS "FRUIT OF THE POISON TREE." THE CONVICTION OF APPELLANT BASED UPON EVIDENCE SO OBTAINED CONTRAVENED APPELLANT'S RIGHTS UNDER THE FOURTH AMENDMENT AND ENTITLE APPELLANT TO HAVE HIS CONVICTION REVERSED FOR WANT OF DUE PROCESS OF LAW.**

The facts upon which the foregoing allegation is based have been set forth in the Statement of Facts, *ante* p. . Appellant will not again belabor them here. The evidence upon the trial of this case conclusively shows that the police officers had sufficient time in which to obtain an arrest warrant, but that they failed to do so. It shows that Appellant was arrested in the middle of the night while he and his family were asleep in their home. The State has not shown at any time that there was any danger that Appellant would elude them during the time they moved to perfect his arrest. No other exigent circumstances have been urged to justify Appellant's arrest under the circumstances of his case. It is Appellant's respectful contention here that his arrest and subsequent detention were unlawful and in violation of his right under the Fourth and Fourteenth Amendments to the United States Constitution to be free from unreasonable seizures of his person. The lineup identification, which formed the basis of the charge upon which he was convicted in the State trial court, was obtained during this period of illegal detention. It is the Appellant's respectful contention here that the opinion of this Court in *Davis v. Mississippi*, 394 U.S. 721 (1969) is dispositive of the issue presented by this Point and that *Davis* compels that his conviction be reversed. Appellant proceeds first to show that an arrest warrant was required

in the circumstances of his case before a lawful arrest could be made; upon making such a showing, he then proceeds to show that *Davis* squarely applies in the circumstances of his case and requires that this Court reverse his conviction.

Appellant contends that a warrantless arrest is invalid when the arresting officer can give no excuse for his failure to secure a warrant, especially where, as here, the officer admits that he had no such excuse.

This Court has many times held that a search executed without a warrant is unlawful if it was reasonably practicable for the officers involved to obtain a search warrant. *Carroll v. United States*, 267 U.S. 132, 156 (1925); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 358 (1931); *Taylor v. United States*, 286 U.S. 1, 6 (1932); *Chapman v. United States*, 365 U.S. 610, 614-615 (1961); *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

In *Carroll v. United States, supra*, this Court noted that in the case of searches the general rule that a warrant is required is subject to an exception where it is not reasonably practicable to obtain one and the officers have probable cause for the search. This Court said (267 U.S. at 156):

> In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause.

To justify a search without a warrant, the officers must show first that it was not reasonably practicable to obtain a warrant and second that the officers had probable cause. Generally a warrant is required; officers can proceed without a warrant only when it is not reasonably practicable to obtain one; even then the officers can proceed without a warrant only if they have probable cause. It is crucial to observe that the exception from the warrant requirement is carved out only for those cases where it is impossible to obtain a warrant. The analysis of probable cause

comes into play only after establishing the impracticability of obtaining a warrant. If it was reasonably practicable for the officers to obtain a warrant, then the search without a warrant is illegal; even though the officers can establish probable cause without a doubt, *Agnello v. United States,* 269 U.S. 20, 33 (1925), the essential predicate of impracticability to obtain a warrant must be laid.

This Court, in the *Trupiano* and *Taylor* cases, both *supra,* reversed convictions because the officers made searches without warrants, having had ample opportunity to obtain them. This Court required a warrant solely upon the basis of the *practicability* of obtaining one. Two years after *Trupiano* was decided, it was overruled by *Rabinowitz v. United States,* 339 U.S. 56, 66 (1950); but the *Rabinowitz* case soon came under fire and gradually lost its influence as a precedent. *Chimel v. California,* 395 U.S. 752, 768 (1969). The *Chimel* case overruled *Rabinowitz* "insofar as the principles they [*Rabinowitz,* and *Harris v. United States,* 331 U.S. 145 (1947)] stand for are inconsistent with those we have endorsed today . . ." *Ibid. Chimel* reinstated the principle that a warrant must be obtained where one is practicable to obtain. There is here no question of the retroactivity of *Chimel.* The Court said that *Harris* and *Rabinowitz* were no longer to be considered as precedents. *Trupiano* and *Taylor* existed prior to the instant case. They are now good law.

There is no question whether the principles of *Taylor* and *Trupiano* cases apply to arrest warrants. This Court has said:

> In *Giordenello* [*v. United States,* 357 U.S. 480 (1958)], although this Court construed the requirement of "probable cause" contained in Rule 4 of the Federal Rules of Criminal Procedure, it did so "in light of the constitutional" requirement of probable cause which that Rule implements. *Id.,* 357 U.S. at 485. The case also involved an arrest warrant rather than a search warrant, but the Court said: "The language of the Fourth Amendment, that

> '. . . no Warrants shall issue, but upon probable cause . . .' of course applies to arrest as well as search warrants." *Id.*, 357 U.S., at 485-486. . . . Accordingly, under *Ker v. California*, 374 U.S. 23 [33] [(1963)], they ["(t)he principles announced in *Giordenello*"] may properly guide our determination of "probable cause" under the Fourteenth Amendment.

(*Aguilar v. Texas*, 378 U.S. 108, 112 n. 3 (1964)). Since *Giordenello* holds that an arrest without a valid warrant is violative of the Fourth Amendment, and since *Ker v. California*, holds the States to the same principles under the Fourteenth Amendment as the Fourth binds the Federal Government, then it is clear that an arrest without a valid warrant, unless there is a recognizable exception applicable, is violative of the Fourteenth Amendment.

There is no such exception applicable to the instant case. The nearest analogy that can be found in the opinions of this Court is the case of *Warden v. Hayden*, 387 U.S. 294 (1967). There the Court was faced with a situation where the police were notified that an armed robber wearing a light cap and dark jacket had entered a house. The police were in close pursuit of such a person. This Court sustained the action by Maryland officers, saying (387 U.S. at 298-299):

> We agree with the Court of Appeals that neither the entry without warrant to search for the robber, nor the search for him without warrant was invalid. *Under the circumstances of this case, "the exigencies of the situation made that course imperative." McDonald v. United States*, 335 U.S. 451, 456 (1948). The police were informed that an armed robbery had taken place, and that the suspect had entered 2111 Cocoa Lane less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require

> police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. *Speed here was essential,* and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape. (Emphasis added).

The instant case is easily distinguishable. The police had for hours possessed all the information with which they acted at the time they moved against the Appellant. The police did not move against Appellant in hot pursuit, but in the middle of the night while he and his family slept. Having delayed as long as they did, the police conduct itself belies any feeling of them that there were exigent circumstances present which "made that course imperative." It is respectfully submitted that the thrust of *Warden v. Hayden* is not that in crimes where dangerous weapons are involved the police may abandon the constitutionally required limitations upon the exercise of their power and proceed without judicial review of the facts and circumstances known to them to determine whether probable cause exists for the intended police movement. If that were the case, then in all crimes of violence the police could dispense with any of the orderly procedures and make up their own rules as they go. This is clearly contrary to the principles announced by this Court in *Johnson v. United States,* 333 U.S. 10, 13-14 (1948), that:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. *Any assumption that evidence sufficient to support a magistrate's disinterested determination to*

> *issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . .* (Emphasis added.)

*Warden v. Hayden* was based upon the existence of exigent circumstances. The fact that the case involved an armed robbery did not furnish the police justification to enter the house and search for the suspect. It was the fact that they were in hot pursuit immediately after the occurrence of an armed robbery, when there is yet a presumption that the person is armed and dangerous, that the exigency was found. Since there were here no similar compelling need for the officer to make an immediate arrest while the investigation and necessary judicial proceedings continued, it is difficult if not impossible to conceive how the information obtained from the truck driver *several weeks after* the robbery supplied the element essential to justify the officer's by-passing the orderly warrant procedure. The arrest was unlawful for want of judicial pre-determination of probable cause for Appellant's arrest and for the deliberate circumvention by the police of the mandates of the Fourth Amendment, made enforceable against the States through the Fourteenth Amendment.

In the case of *Davis v. Mississippi*, 394 U.S. 721, 727-728 (1969), this Court recognized the general requirement that the authorization of a judicial officer be obtained *in advance of detention.* Appellant views the import of *Davis* to be the application of the rule that warrants must be obtained in advance of detention whenever "reasonably practicable" failing which evidence obtained during the period of illegal detention, as a direct result of that detention, will be suppressed.

In the *Davis* case, this Court refused to distinguish between illegally obtained fingerprints and illegally obtained eyewitness identification and confessions. 394 U.S. at 723-724, 727. This Court said (394 U.S. at 724):

> Our decisions recognize no exception to the rule that illegally seized evidence is inadmissible at trial, however relevant and trustworthy the seized evidence may be as an item of proof. The exclusionary rule was fashioned as a sanction to redress and deter over-reaching governmental conduct prohibited by the Fourth Amendment. . . . [I]n *Mapp v. Ohio, [supra]* we held that "all evidence obtained by searches and seizures in violation of the Constitution is, by the same authority, inadmissible in a state court."

This Court expressly adopted the conclusion of the opinion of the Court of Appeals for the District of Columbia in *Bynum v. United States,* 104 U.S. App. D.C. 368, 262 F.2d 465 (1958). The *Bynum* Court has phrased the issue:

> But there remains the question whether the fact that an illegal arrest enabled the police to take these fingerprints while the suspect was illegally detained is in itself and without more a sufficient ground for excluding them from evidence. The Court below thought it was not. We think it is.

There is no doubt in the instant case that the line-up photograph and identification of the Appellant (entered over the objection and exception of trial counsel) resulted solely from "the fact that an illegal arrest enabled the police [to place the Appellant in a line-up before several victims of similar robberies which were then under investigation] while the suspect was illegally detained." *Bynum v. United States, supra. Bynum* has been explicitly held to govern the identification at a line-up after an illegal arrest. *Gatlin v. United States,* 117 U.S.App.D.C. 123, 326 F.2d 666, 673.

Appellant was never prosecuted for the crimes for which he was originally arrested and booked. He was charged and convicted on the basis of an identification made by a person not the victim of the crimes for which Appellant had been arrested and was being detained. There had been no judicial determination that Appellant should be

committed to jail so as to legitimate the illegal arrest. Formal charges had not been pressed by the State at that time. In this regard, Appellant's detention was purely "investigatory." Exploitation of an illegal arrest and "investigatory detention" cannot be sustained by this Court if the opinions in the *Davis, Gatlin* and *Bynum* cases are to hold any security for the rights of our people. See *Wong Sun v. United States,* 371 U.S. 471, 488 (1963); *Johnson v. United States, supra,* 333 U.S. at 15. The trial court should have excluded the line-up identification, failing which it committed prejudicial error. *Davis v. Mississippi, supra; Gatlin v. United States, supra.*

The record shows that this evidence constituted the major vehicle of prosecution. It therefore cannot be said that this error was "harmless beyond a reasonable doubt." *Chapman v. California,* 386 U.S. 18, 24 (1967); *Fahy v. Connecticut,* 375 U.S. 85 (1964).

The evidence of Appellant's identification at the line-up conducted while Appellant was illegally detained should have been suppressed. For failure of the trial court to have done so, the Appellant's conviction must be reversed.

## CONCLUSION

For the above and foregoing reasons, Appellant's conviction should be reversed and this cause remanded to the Louisiana Supreme Court for entry of a mandate in conformity with such an opinion.

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IN THE

# Supreme Court of the United States

October Term, 1970

No. [redacted]69-5035

FRANK JOHNSON

versus

STATE OF LOUISIANA

Appeal From the Supreme Court of Louisiana

## BRIEF OF THE STATE OF LOUISIANA, APPELLEE

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1970

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No. 5161

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FRANK JOHNSON

versus

STATE OF LOUISIANA

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Appeal From the Supreme Court of Louisiana

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# BRIEF OF THE STATE OF LOUISIANA, APPELLEE

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## STATEMENT OF THE CASE

At about 3:30 on the afternoon of December 26, 1967 Eugene Frischertz, route salesman for the Coca-Cola Bottling Company, was sitting in his truck getting ready to pull away from Brown's Grocery at 2139 Third Street in New Orleans when an armed robber pointed a revolver at him and demanded all of his money. R. 66-67. Frischertz handed the bandit $600.00 belonging to the Coca-Cola Company, the checks from the day's deliveries, and $31.00 of his own money. The gunman fled on foot and Frischertz used the telephone in the grocery to summon the police. R. 79. When the police arrived the route salesman gave them a description of the robber. R. 80-81.

The New Orleans Police around this time also received reports of other armed robberies of truck drivers. R. 18, 57.

Sometime during the next few weeks officers of the New Orleans Police Department got word from a confidential informer that Frank Johnson, Appellant herein, and another man had recently been involved in the armed robberies of several truck drivers. The police obtained from the Bureau of Identification a photograph of Frank Johnson and the other man mentioned by the informant, placed these two pictures in a group with others, and showed the photographs to one of the victims, a driver employed by Brown's Velvet Dairy Products, Inc., who had also been robbed recently. This driver positively identified Frank Johnson as the person who had held him up, marking Johnson's picture with his initials and the date. R. 17-18, 55-56, 85-86.

On January 20, 1968, members of the New Orleans Police Department went to Frank Johnson's house around six-thirty in the morning. They were admitted by Johnson's wife, found Johnson under the bed and arrested him for armed robbery. R. 18, 38, 58-60. Louisiana concedes that the officers had no warrant of arrest for Appellant.[1]

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[1]No evidence pertinent to the instant case was seized by the police in the search following Johnson's arrest. R. 17, 61-62. In this connection this Court's attention is called to the fact that the Motion to Suppress filed by Appellant prior to trial (see R. 4, 10) was overruled as moot, R. 17, and the only physical evidence offered by the prosecution at the trial of this case was a photograph of the pretrial lineup, Exhibit S-1, at which Appellant was identified.

A few days later Frischertz picked Johnson out of a police lineup and identified Appellant as the man who had robbed him while Frischertz was working his Coca-Cola route on December 26, 1967. R. 68, 83.

On February 14, 1968 Frank Johnson was charged in a bill of information filed by the District Attorney for the Parish of Orleans with armed robbery of Eugene Frischertz in the amount of $631.00. See Art. 64 La. Crim. Code. The accused pleaded not guilty. He was tried, found by nine of the twelve man jury to be guilty as charged, and sentenced to serve 35 years in the Louisiana State Penitentiary. He appealed to the Louisiana Supreme Court, which affirmed his conviction. *State v. Johnson*, 255 La. 314, 230 So.2d 825 (1970). He appealed to this Honorable Court, which set the matter down for argument. In this Court Appellant complains of 1) the nine out of twelve jury verdict, and 2) his arrest without warrant.

## ARGUMENT

### I

### A Conviction or Acquittal by Majority Verdict of the Jury Violates Neither the Due Process Clause nor the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution

Article 7, Section 41, of the Louisiana Constitution pertinently provides

> "Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all

> of whom must concur to render a verdict; *cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict;* cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.[2] (Italics ours)

Implementing the foregoing constitutional mandate, Article 782 of the Louisiana Code of Criminal Procedure stipulates:

> "Cases in which the punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. *Cases in which the punishment is necessarily at hard labor shall be tried by a jury composed of twelve jurors, nine of whom must concur to render a verdict.* Cases in which the punishment may be imprisonment at hard labor, shall be tried by a jury composed of five jurors, all of whom must concur to render a verdict. Except as provided in Article

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[2]The nine out of twelve jury first appeared in the Louisiana Constitution of 1898. See also La. Const. 1913, Art. 116. No explanation of why the majority verdict was adopted by Louisiana in 1898 has been found. But see *State v. Green*, 7 La.Ann. 518, 520 (1852) ("The frequency of their (the jury's) disagreement is undoubtedly a great evil, and perhaps would justify a constitutional or legislative provision for the verdict of a majority.")

The first sentence of Art. 7, Sec. 41, of Louisiana's present constitution, which provides for a judge trial in misdemeanor cases has, of course, been modified by this Court's decision in *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Baldwin v. New York*, 399 U.S. 66 (1970).

780, trial by jury may not be waived."[3] (Italics ours)

Various theories have been advanced to explain the unanimous verdict requirement in jury trials which exists in many jurisdictions. One notion is that in centuries past there were very few rules to assure the accused a fair trial and that the practice of requiring unanimity among the jurors in order to convict was developed to protect the accused. Another theory is that the English Crown often exerted pressure on the judges to convict, and that to shift the pressure from themselves the judges initiated the unanimity rule. A third explanation is that unanimity was required to counterbalance the extremely harsh punishments which were imposed on convicted felons in times past. See Ryan, Less Than Unanimous Jury Verdicts in Criminal Trials, 58 J. Crim. L., C. & P. S. 211, 212 (1967).

The explanation offered by Lord Justice Devlin — that the unanimity rule developed by chance — is probably the correct one. In trial by compurgation, which existed in England in medieval times, twelve jurors were assembled to swear to the validity of a party's oath, and additional jurors were brought in until one party had twelve compurgators swearing to his position. As the function of the jury gradually shifted to judging credibility rather than swearing to it, the practice of adding to the original twelve jurors

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[3]Art. 780 La. Code Crim. Proc. provides that a jury cannot be waived in either a capital case or one in which the imprisonment is necessarily at hard labor. Thus a jury could not have been waived in the present case.

was abandoned, but the requirement that the Crown obtain twelve votes to convict was kept. See Devlin, Trial By Jury 48 (1956); see also Thayer, The Jury And Its Development, 5 Harv.L.Rev. 249, 261 (1892).

Thus unanimity in criminal proceedings, which existed in England at the time this country was colonized, evolved from a type of majority verdict system which required that at least twelve of the jurors support the verdict.

At the present time many foreign and common law systems, notably former British territories, operate a majority system. See Samuels, Criminal Justice Act, 31 Modern L. Rev. 16, 25 (1968). The Scots have a long history of simple majority verdicts (8 to 7).[4] See Majority Verdicts, 116 New L. S. (pt. II) 1186 (1966). Moreover, in 1967 England itself, the originator of the jury system as we know it, adopted majority verdicts in criminal trials. The Criminal Justice Act enacted in that year provides in c. 80, s. 13, that the verdict of a jury in criminal proceedings need not be unanimous if in a case where there are at least eleven jurors ten agree on the verdict, or in a case where there are ten jurors, nine agree on the verdict, but that the court shall not accept a majority verdict of guilty unless the jury has deliberated for at

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[4] In Scotland in addition to guilty and not guilty there is a third possible verdict of "not proven". Majority Verdicts, 116 New L. J. (pt. II) 1186 (1966).

least two hours. See 47 Halsbury's Statutes of England 381 (Cont. Vol. 1967).[5]

As this Court knows, in colonial times Connecticut permitted majority decision in case of continued failure to agree, Pennsylvania allowed majority verdicts, and the Carolinas also abandoned the unanimity requirement. See *Williams v. Florida*, 399 U.S. 78 (1970), n. 45, at 399 U.S. 98. Further, majority jury verdicts are legal in criminal cases in several jurisdictions in the United States today, in addition to Louisiana. Thus, in Oregon 10 out of 12 jurors may return a verdict of guilty except in murder cases, Art. I, Sec. 11, Ore. Const.; in Texas 9 out of 12 jurors may render a verdict in all criminal cases below the grade of felony, Art. V., Sec. 13, Tex. Const; in Montana 4 out of 6 jurors can render a verdict in misdemeanor cases, Art. III, Sec. 23, Mont. Const.; in Idaho a five out of six verdict is possible in misdemeanor cases, Art. I, Sec. 7, Idaho Const.; and in Oklahoma a three-fourths verdict can be returned in misdemeanor cases, Art.

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[5]There are no alternate jurors in England. If during a trial a juror dies, or becomes ill, or for some other reason is discharged by the court, the remaining jurors continue to function as a valid jury provided the number is not reduced below nine. See Criminal Justice Act 1965, 45 Halsbury's Statutes of England 215 (2d ed. 1965).

For the Practice Direction on majority verdicts, see Current L. Bk. 1967, sec. 2188 (ed. Burke, 1968); see also 32 J. Crim. L. (Eng.) 30-32 (1968).

For criticism of the required two-hour deliberation time (an "arbitrary and artificial two-hour safeguard"), see Samuels, Criminal Justice Act, 3 Modern L.Rev. 16, 25 (1968). See also *R.V. Bateson*, (1969) 3 All E.R. 1372; *R.V. Adams*, (1969) 1 W.L.R. 106, for cases dealing with technicalities as to how the two hour deliberation time should be computed.

II, Sec. 19, Okla. Const. Also in Puerto Rico 9 out of 12 jurors can convict of a felony, Art. II, Sec. 11, P. R. Const.

In *Williams v. Florida*, supra, this Court rejected the idea that every feature of the jury as it existed at common law was necessarily included in the Constitution wherever that document refers to a jury. This Court's opinion in *Williams* also noted the fact that although as introduced by James Madison in the House, the Amendment relating to jury trial in criminal cases would have provided that the jury verdict must be, among other things, unanimous, and the Amendment passed the House with this requirement, the requisite of unanimity was deleted in the Senate, and as adopted the Sixth Amendment ensured an accused:

> "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . ." (399 U.S. at 94)

**A. Due Process**

The issue for decision in the instant case is whether a majority jury verdict in State criminal trials violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by infringing upon the right of a person accused of a crime to be convicted only upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with

which he is charged. See *In re Winship,* 397 U.S. 358 (1970); *Williams v. Florida,* supra, n. 46 at 399 U.S. 100.

It is Louisiana's position herein that majority jury verdicts in no way infringe upon the reasonable doubt principle and hence do not deprive an accused person of Due Process of Law.

In Louisiana as in other common law jurisdictions the court in criminal trials always charges the jury that the accused is presumed by law to be innocent until his guilt is proven beyond a reasonable doubt, and that it is the duty of the jury, if not convinced of the guilt of the accused beyond a reasonable doubt, to find him not guilty. See Art. 804 (1) - (3) La. Code Crim. Proc.; *Coffin v. United States,* 156 U.S. 432 (1895); *In re Winship,* supra.

The question here seems to be whether the jury reaches its verdict as a body or as separate individuals. If we accept the view that the jury arrives at its verdict as a body, or entity, then certainly the burden or proof is lower if the prosecution does not have to convince all of the members of the jury of the guilt of the accused by proof beyond a reasonable doubt. However, the fallacy of the entity approach has often been demonstrated by, among other things, pointing out that under this theory the reasonable doubt of one juror would result in an acquittal instead of the hung jury which actually results. See *State v. Robbins,* 176 Ohio St. 362, 199 N.E.2d 742 (1964); Ryan, Less Than Unanimous Jury Verdicts in Criminal Trials, 58 J.Crim. L. C. & P. S. 211, 215 (1967).

On the other hand if we believe (as Louisiana does) that the jury decides a case as individuals, then the burden of proof beyond a reasonable doubt is in no way altered by the number of jurors who must be convinced of guilt to the constitutionally accepted degree. The burden remains the same because the majority who are empowered to decide must be convinced beyond a reasonable doubt. See *Fournier v. Gonzalez,* 269 F.2d 26, 28 (1st Cir. 1959); Samuels, Criminal Justice Act, 31 Modern L.Rev. 16, 24 (1968).

It has been suggested that the factor which changes as the number of jurors on the panel who must be convinced of guilt is reduced is the prosecution's burden of persuasion. See Waiver of Jury Unanimity — Some Doubts About Reasonable Doubt, 21 U. Chi. L. Rev. 438, 443 (1965), compare *Hibdon v. United States,* 204 F.2d 834 (6th Cir. 1953). Whether the prosecution's burden of persuasion is in fact lowered in cases decided by majority jury verdict is extremely doubtful, as will be shown in Part II of this brief. Certainly there exist no figures based on actual experience which suggest that the percentage of convictions in criminal cases is higher in jurisdictions which use the majority jury verdict.

In urging the adoption of the 1967 majority verdict law the English Home Secretary, Mr. Roy Jenkins, said that he did not believe that there was danger that the new rule would damage the innocent, and pointed to the example of the Scots, who have long applied a system of simple majority verdicts without such consequences. See Majority Verdicts, 116 New L.J.

1620 (pt. II 1966). The English example is certainly persuasive when we remember that the presumption of innocence and its corollary, the reasonable doubt standard, originated in England, and were brought to this country by Englishmen.

Moreover, it is incorrect to assume, as Appellant herein does, that a unanimous verdict is "inextricably interwoven with the required measure of proof." (*Hibdon v. United States,* supra, at 204 F.2d 838). Studies have shown that the unanimity rule and the reasonable doubt principle developed at different times and under different circumstances. See Unanimous Criminal Verdicts and Proof Beyond a Reasonable Doubt, 112 U. Pa. L.Rev. 769 (1964). As a matter of fact, the concept that in a criminal case guilt must be established beyond a reasonable doubt is a comparatively recent one, having been applied at first only in capital cases and having developed gradually as courts in this country and England struggled with the proper terms to use in instructing the jury as to the degree of certainty which must exist in the jurors' minds in order for them to reach a guilty verdict. See 9 Wigmore, Evidence 316-325, sec. 2497 (3d ed. 1940). Of course the presumption of innocence has long been rooted in English common law. See *Coffin v. United States,* 156 U.S. 432 (1895).

It is important to remember that a person accused of crime can be *acquitted* by a majority verdict as well as *convicted.* Proponents of the English majority verdict law point out that an accused would surely prefer an acquittal 10:2 than a disagreement and a re-

trial. See Samuels, Criminal Justice Act, 31 Modern L.Rev. 16, 25 (1968).

**B. Equal Protection**

Louisiana is of the respectful belief that the constitutional and statutory provisions here at issue — that criminal cases in which the punishment is necessarily at hard labor shall be tried by a jury composed of twelve jurors, nine of whom must concur to render a verdict — do not deprive Appellant of the Equal Protection of the Laws guaranteed to him by the Fourteenth Amendment to the United States Constitution, for the reason that all persons in similar circumstances are tried by the same type of jury. Thus, in being found guilty of armed robbery, for which the punishment in Louisiana is necessarily at hard labor, by the concurrence of nine out of twelve jurors, Appellant has been treated exactly like all persons in Louisiana who are tried for crimes for which the punishment is necessarily at hard labor. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); compare *Gardner v. Michigan*, 199 U.S. 325 (1905).

Moreover, the distinction which the Louisiana Legislature has made in the size and method of voting of juries in this State — that cases in which the punishment may be at hard labor shall be tried by a jury of 5, all of whom must concur to render a verdict; that cases in which the punishment is necessarily at hard labor shall be tried by a jury of 12, 9 of whom must concur to render a verdict; and that cases in which the punishment may be capital shall

be tried by a jury of 12, all of whom must concur to render a verdict — is not arbitrary, unreasonable, or capricious, as contended by Appellant, but, on the contrary, is calculated to expedite the administration of criminal justice in Louisiana, a purpose which grows more laudable as our criminal dockets become daily more congested and the administration of criminal justice becomes slower and more cumbersome. See *State v. Green*, 7 La.Ann. 518, 520 (1852), in which the Louisiana Supreme Court over a century ago suggested that the remedy for the jury's frequent disagreement might be the majority verdict; *State v. Lewis*, 129 La. 800, 56 So.2d 893 (1911).

The provision for majority verdicts (9 out of 12) in cases necessarily punishable at hard labor reduces the time it takes to try each case and also diminishes the necessity for a retrial due to a hung jury. Similarly, the five man unanimous jury required for crimes which may be punishable at hard labor saves manpower and time, as less jurors are needed for each case, less time is spent on voir dire examination, and it takes less time for five men to reach unanimity than for 9 or 12 men to arrive at this result. The provision that in capital cases the jury must be of 12 men and must reach a unanimous verdict is probably of more psychological than real value, as the thought of putting a fellow man to death fills most persons with some degree of awe and guilt.

It must be remembered that there are available no figures based on actual study and analysis to suggest that the percentage of convictions in criminal

cases decided by a majority jury verdict is any higher than in those cases decided by a unanimous verdict, because to our knowledge no one has undertaken such a project. However, the experience of Scotland, of various members of the British Commonwealth, and of England since 1967 strongly suggests otherwise. Moreover, figures compiled by Kalven and Zeisel in their recent book The American Jury, which analyses the legal decision-making process and attempts to evaluate the relative performances of judge and jury in similar cases, show that if allowed to deliberate long enough juries arrive at unanimity ninety-five percent of the time and hang the remaining five percent of the time, and that of the cases decided by unanimous verdict ninety-five percent of the time, the conviction-acquittal ratio is roughly 2 convictions for 1 acquittal. See Kalven and Zeisel, The American Jury 56-58, 461, 488 (n. 13) (1966). Moreover the authors' conclusion that the jury generally decides the case before deliberation begins, see pp. 488-489, casts doubt on the value of forcing the jury to deliberate for an extended period of time.

Thus, as shown by Kalven and Zeisel, Lousiana's 9 out of 12 jury, if allowed to deliberate long enough, would inevitably reach unanimity ninety-five percent of the time, at a ratio of 2 convictions to 1 acquittal. Additionally, of the five percent of cases which result in hung juries in unanimous verdict cases, 56 percent would be decided by a majority vote of 9 out of 12 (or 10 out of 12, or 11 out of 12) jurors — or only about three percent of all the cases tried by this type of jury. (56% x 5.5%) Of this three

percent of cases decided by 9 out of 12, etc., jurors (that would hang in Louisiana in capital cases and cases in which the punishment may be at hard labor) the conviction-acquittal ratio is at a somewhat higher rate, or approximately 3 1/2 convictions to 1 acquittal instead of 2 convictions to 1 acquittal. *Id.* at pp. 460-461. However, we must remember that in some of the five percent of cases which end in a hung jury in the unanimous jury cases the accused will be convicted on retrial, at a ratio we do not know. Consequently it appears that there is no appreciable difference in the percentage of convictions by a majority verdict as compared to a unanimous verdict. That is, it appears that the majority of the jurors have the same high threshold of reasonable doubt as the entire jury, which interprets the proof beyond a reasonable doubt principle more generously than does a judge. *Id.* at p. 189. The explanation of the foregoing is found in The American Jury at p. 488-489, where the authors conclude that the function of the jury's deliberation process is not so much to decide the case as to bring about a consensus.[6] See also Comment, On Instructing Deadlocked Juries, 78 Yale L.J. 100, 109 (1968).

Thus in the instant proceedings there was a 95% chance that the jury which convicted Appellant would have reached unanimity had it continued its deliberations beyond the 9 to 3 stage instead of returning to court with its verdict at this point. There was also a 2% chance that the jury would hang at 8:4, 7:5,

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[6] **"The deliberation process might well be likened to what the developer does for an exposed film; it brings out the picture, but the outcome is pre-determined."**

or 6:6, with at least a 50% (and perhaps higher) chance that Appellant would be convicted later. In view of the jury vote which actually occurred herein (9:3), there was almost no chance that Appellant could have been acquitted, as figures in Kalven and Zeisel's book show that "only with extreme infrequency does the minority succeed in persuading the majority to change its mind during the deliberation." The American Jury, at p. 488. Of course, prior to trial there was a 33% chance of Appellant's being acquitted by a unanimous verdict plus an additional approximately 1% chance of acquittal by a majority verdict.

Furthermore, we can conclude that the 9, 10, or 11 jurors out of 12 who vote for conviction or acquittal in Louisiana in cases necessarily punishable at hard labor believe firmly in their decision and are not pressured into the majority view, because if any one of them wants to dissent from the majority he has at least one supporter to back up his position, a significant factor in the opinion of those who have studied the manner in which juries operate. See Comment, On Instructing Deadlocked Juries, 78 Yale L.J. 100, 110 (1968) ("A single ally gives most dissenters the courage to voice their true convictions."); Kalven and Zeisel, *op. cit. supra*, p. 463.

In view of the fact that there is no factual basis to suppose that Appellant ran a higher risk of conviction when tried by a jury of 12, 9 of whose members could return a verdict, and the further fact that all accused persons in Appellant's class are similarly tried by majority verdict, the State of Louisiana respect-

fully suggests to this Court that there is no merit to Appellant's Equal Protection argument.

## II

### The Majority System Affects the Verdict in Only a Tiny Minority of Cases

As was poined out above, Kalven and Zeisel in their recent book The American Jury show that if allowed to deliberate long enough the jury reaches a unanimous verdict in approximately 95 percent of all cases, and that in approximately 5 percent of all cases the jury hangs. Moreover, the conviction-acquittal ratio of the unanimous verdicts arrived at in 95 percent of the cases is 2 convictions for 1 acquittal. See Kalven and Zeisel, The American Jury 56-58, 461, 488 (n. 13) (1966).

Thus we may assume that in Louisiana juries would eventually arrive at a unanimous verdict, at a conviction-acquittal ratio of 2 to 1, in 95 percent of all cases in which punishment is necessarily at hard labor if the jury continued its deliberations beyond the 9 to 3 stage. Further, from Table 25 of The American Jury, p. 460, which shows the last vote of hung juries, we can also assume, as do Kalven and Zeisel, that of the remaining 5 percent of cases in which the jury hangs in unanimous verdict cases, a 9:3, 10:2, or 11:1 verdict would be reached in Louisiana in cases necessarily punishable at hard labor 56 percent of the time — or in *approximately 3 percent of the total number of cases of this type tried in Louisiana.*

When we remember that of this 3 percent of the cases which are decided in the 9 out of 12 category when the unanimous jury hangs, the accused is often convicted on retrial in the unanimous jury cases,[7] we readily see that Louisiana's majority jury verdict only actually affects a very small minority of cases. It is also relevant to note that The American Jury, which deals, among other things, with the higher rate of convictions in judge trials as compared to jury trials, does not indicate that there is a higher conviction rate in jurisdictions like Louisiana which allow majority jury verdicts in criminal cases; on the contrary, the authors suggest wider use of the majority verdict in order to reduce the number of hung juries. See p. 461. See also Carlisle, The Criminal Justice Act 1967, 1967 Crim. L. Rev. (Eng.) 613, in which the author notes that the new English majority verdict law is "unlikely to affect more than a tiny minority of cases".

Although the majority verdict actually affects the type of verdict ultimately arrived at in only a small fraction of all the cases tried in this manner, the system saves considerable time in all cases in which it is used because the jury returns to the courtroom with its verdict as soon as nine of its members agree either to convict or acquit.

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[7]The proportion of convictions that are obtained after the first trial ends with a hung jury is not known. See A.B.A. Standards Relating to Trial by Jury 27 (1968). Kalven and Zeisel suggest that roughly half the hung jury cases end up as an acquittal, but state that they were unable to obtain reliable statistics on the final disposition of the hung jury cases, and that the practice varies according to jurisdiction. See The American Jury, pp. 57-58 n. 4.

Additionally, it would appear that prevention of oppression by the Government, which is the primary purpose of the jury trial (see *Duncan v. Louisiana*, 391 U.S. 145 (1968): *Williams v. Florida*, 399 U.S. 78 (1970); and *Baldwin v. New York*, 399 U.S. 66 (1970) ) is in no way affected by the use of a majority verdict, as there still exists a body of laymen whose judgment is interposed between the accused and his accuser and who are less likely to function or appear as but another arm of the Government that is bringing the charge.

In England the Government's chief reason for changing from the unanimous to the majority jury verdict was the mounting problem of corruption or intimidation of jurors ("nobbling") to prevent a unanimous vote for conviction, chiefly in cases involving organized crime, and also in order to neutralize the perverse juror. It was pointed out that failure of the jury to arrive at a verdict wastes time, money, and judge power, especially in a long case. See Majority Verdicts, 116 New L.J. (pt. II) 1186, 1620 (1966); Samuels, Criminal Justice Act, 3 Modern L.Rev. 16, 24 (1968); Roydhouse, Criminal Law and Criminal Justice Acts 1967, p. 117 (1968); Bloomstein, The Jury System, p. 112 (1968). For an example of "nobbling" in this country, see *Hoffa v. United States*, 385 U.S. 293 (1966), involving the Test Fleet trial, which ended with a hung jury.

It is also relevant to note that in its Minimum Standards For Criminal Justice the American Bar Association has recently recognized "the propriety of less than unanimous verdicts, as now permitted in six states."

See Standards Relating to Trial By Jury 28, sec. 1.1(d) (1968).

One of the advantages of federalism is that it permits different courses of action to be follow[illegible] in different States simultaneously. At the present time England has changed over to majority verdicts,[8] and leading authorities in this country have approved the use of majority verdicts in order to improve the administration of criminal justice.

In Louisiana and the other States which presently use the majority verdict system we have an unparalled opportunity to study this procedure in actual operation, and to compare its advantages and disadvantages with the unanimous verdict procedure. No one has ever contended, much less demonstrated, that the rate of conviction is appreciably, or even slightly, higher in jurisdictions such as Scotland and Louisiana which employ majority jury verdicts; on the other hand, it has been effectively shown that time, money and judge power are saved through use of this procedure. It is respectfully submitted to this Court that Louisiana should be allowed to retain its majority verdict procedure, which has served it well in the past 72 years.

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[8]It has been suggested that the English system is more flexible than ours because the English Constitution, unlike ours, is a product of the common law and easily adapts to changing circumstances. Ryan, Less Than Unanimous Verdicts, 58 J. Crim. L.C. & P.S. 211, 213 (1967).

## III

### No Warrant Is Needed for an Arrest Based on Reasonable Cause

Article 213 of the Louisiana Code of Criminal Procedure provides that a police officer may, without a warrant, arrest a person when there is reasonable cause to believe that the person to be arrested has committed an offense, although not in the presence of the officer. Article 216 of the Code states that an arrest may be made on any day, at any time of the day or night, and at any place. Article 224 of the Code allows an officer who has announced his authority and purpose to enter any dwelling in which the person to be arrested is reasonably believed to be, in order to make the arrest.

At common law it has long been the rule that a peace officer has the right and even the duty to arrest without a warrant a person whom he has reasonable ground to believe has committed a felony, although not in his presence. See Fisher, Laws of Arrest, pp. 124-136, 166-178 (1967); Perkins, The Law of Arrest, 25 Iowa L. Rev. 201, 233-234 (1940); Schwartzman and Stein, Law of Personal Liberties, p. 14 (1955); Leagre, The Fourth Amendment and the Law of Arrest, 54 J. Crim. L., C. & P. S. 393, 403 (1963); Orfield, Criminal Procedure From Arrest To Appeal, p. 14-23 (1947); Wilgus, Arrest Without A Warrant, 22 Mich. L. Rev. 541, 560, 673 (1923-24).

Further, it has been settled since early times that an arrest for a felony can be made, with or without

a warrant, in the house of the arrestee himself, although generally the officer cannot break in the door to make the arrest unless he has been refused admittance after announcing his authority and purpose. See *Semayne's Case*, 5 Coke 91, 77 Eng. Rep. 194 (K.B. 1604).[9]

**A. There Was Reasonable Cause For The Arrest**

The record in this case shows that approximately three weeks after Eugene Frischertz, route salesman for the Coca-Cola Bottling Company, was robbed, Officer Theodore Feld through his superior officer, Captain Newman, received information from a confidential informer that Frank Johnson, Appellant herein, and a Harold Hayes were engaged in armed robberies of truck drivers. Officer Feld obtained from the Bureau of Identification photographs of Frank Johnson and Hayes, placed these pictures in a group with others, and sent Detective John Lanza to show the collection of photographs to a Marion Catalano, a truck driver for Brown's Velvet Dairy, who, as the police knew, had also been robbed recently. Catalano picked out pictures of Frank Johnson and Harold Hayes as the men who had robbed him, marking the photographs

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[9] "J. beats R. so as he is in danger of death, J. flies, and thereupon hue and cry is made, J retreats into the house of T. they who pursue him (D), if the house be kept and defended with force (which proves that first request ought to be made) may lawfully break the house of T. for it is at the K's suit." *Semayne's Case*, 77 Eng. Rep. at 196 (K.B. 1604).

"(D) Either with or without a warrant, and whether the pursuit is by a constable or private person. Hawk. P.C.B. 2 chap. 14. 27."

with his initials and the date of the offense. R. 55-56, 17-18.

Thus at the time the New Orleans Police Officers arrested Frank Johnson they knew that several truck drivers had been robbed recently; they had information from a confidential informer that Frank Johnson had been involved in one or more of those robberies; and Catalano, a Brown's Velvet Dairy truck driver who had recently been robbed, picked the photograph of Frank Johnson out of a group of pictures which the police showed him and positively identified Appellant as the man who had held him up.

Reasonable (or probable) cause to make an arrest exists, as this Court knows, when the facts and circumstances within the arresting officer's knowledge, and of which he has trustworthy information, are sufficient in themselves to justify a man of average caution in the belief that the person he is arresting has committed a crime. Further, in determining compliance with this standard of reasonable cause, the degree and type of proof required for conviction is not necessary. The proof needed to satisfy the requirement of reasonable cause for a warrantless arrest is commensurate with the term itself — that is, the probabilities and practical considerations of everyday life on which reasonable men can be expected to act. *Carroll v. United States,* 267 U.S. 132, 162 (1925); *Brinegar v. United States,* 338 U.S. 160, 175 (1949); *McCray v. Illinois,* 386 U.S. 300 (1967); *Sibron v. New York,* 392 U.S. 40, 66 (Peter's case) (1968).

Louisiana respectfully suggests to this Court that the police officers in the present proceeding acted upon reasonable cause.

**B. There Was No Need To Obtain A Warrant**

There was no necessity for the officers in the instant case to secure a warrant in order to arrest Appellant. Having statutory authority to make arrests without a warrant when reasonable cause exists, see Art. 213 La. Code Cr. Proc., police officers in Louisiana never swear out an arrest warrant in a case such as the present one where they know the whereabouts of the person to be arrested and he is within their jurisdiction. As a practical matter, if the police had to spend half a day or more preparing an arrest warrant with supporting affidavit and submitting it to a judge for study and approval every time they took a person into custody or picked up a runaway child, their efficiency would be seriously impaired. It must be remembered that the State police have the duty of preserving the public peace, unlike federal agents, who have no general peace keeping duties. Consequently, no broad statute permitting warrantless arrests similar to Louisiana's Article 213 of the Code of Criminal Procedure exists in federal law, as none is needed. However, for many years federal arrests were governed by state law. *United States v. Di Re*, 332 U.S. 581 (1948); *Miller v. United States*, 357 U.S. 301 (1958); *United States v. Coplon*, 185 F.2d 629, 633-635 (2d Cir. 1950); and in the past forty years Congress has authorized various federal officials to make warrantless arrests, *e.g.*, 18 U.S.C. § 3052 (F.B.I. agents); 18 U.S.C. § 3053 (United States Marshals); 18 U.S.C. § 3056 (Secret Service

agents); 26 U.S. § 7607 (2) (Bureau of Narcotics agents).

Although the precise question here at issue was not posed, this Court has upheld arrests without warrant in situations in which there would have been time to procure one. In *Draper v. United States,* 358 U.S. 307 (1959), an informant on September 3, 1956, told Marsh, a federal narcotic agent, that Draper had recently taken up abode at a stated address in Denver and was peddling narcotics to several addicts in that city. Four days later, on September 7, the informer told the agent that Draper had gone to Chicago the day before by train, that he was going to bring back three ounces of heroin and that he would return to Denver on the morning of either September 8 or September 9, also by train. At this time the informer gave Marsh a detailed physical description of Draper. On the morning of September 9 the agent arrested Draper as he alighted from an incoming Chicago train. In its opinion in *Draper* this Court set out the provisions of 26 U.S.C. § 7607, added by § 104 (a) of the Narcotic Control Act of 1956, 70 Stat. 570, which allows an agent of the Bureau of Narcotics to make an arrest without warrant when the agent has reasonable grounds to believe that the person to be arrested is committing a narcotic offense (and which is similar to Article 213 of the Louisiana Code of Criminal Procedure) and said:

> "The crucial question for us then is whether knowledge of the related facts and circumstances gave Marsh 'probable cause' within the meaning of the Fourth Amendment, and 'reasonable grounds' within the meaning of

> § 104 (a) *supra*, to believe that petitioner had committed or was committing a violation of the narcotic laws. If it did, the arrest, *though without a warrant*, was lawful ...." 358 U.S. at 310. (Italics ours)

See also *Ker v. California*, 374 U.S. 23 (1963); compare *Henry v. United States*, 361 U.S. 98 (1959), and *Wong Sun v. United States*, 371 U.S. 471 (1963), in which this Court held arrests without warrant to be invalid because not based on probable cause within the meaning of the Fourth Amendment nor reasonable grounds within the meaning of the arrest without warrant statutes.

In *Wilson v. Schnettler*, 365 U.S. 381 (1961), federal agents arrested petitioner without a warrant and seized narcotics which they found on his person in the course of an incidental search. Petitioner sued in federal district court to impound the narcotics, to enjoin their use in evidence, and to enjoin the agents from testifying against him. Although his complaint alleged that the arrest was made without a warrant, there was no allegations that it was made without probable cause. This Court sustained dismissal of the complaint for failure to state a claim upon which relief could be granted. In its opinion this Court said that if the agents had probable cause "the arrest, though without a warrant, was lawful". 365 U.S. at 383.

In the present case the Coca-Cola Company robbery occurred on December 26, 1967. R. 57. On January 18, 1968 a confidential informer told Captain Newman of the New Orleans Police Department that Appellant and

a Harold Hayes were involved in the armed robbery of truck drivers. R. 56. The police got pictures of Johnson and Hayes from the B. of I., placed these photographs in a group with others, and showed them to Marion Catalano, a truck driver for Brown's Velvet Ice Cream who had been robbed three times recently. Catalano positively identified Appellant as the man who had robbed him. The record does not show the date on which Catalano made this identification, but it was probably done on January 19, the day following the informer's tip because the record shows that there was a little difficulty in finding the truck driver, who was out on his route. R. 58-59. On January 20, two days after receiving the confidential tip, at about six-fifteen or six-thirty in the morning, Lieutenant Theodore Feld of the Robbery Division and five other armed officers went to Appellant's home at 2135 Philip Street in New Orleans, and knocked on the front door. The officers had no warrant of arrest. R. 55, 58-59. When Mrs. Johnson came to the door the officers identified themselves as the police and said that they had come to arrest Frank Johnson for robbery. R. 36, 50-53, 58-60. Mrs. Johnson admitted the officers, who found Appellant under the bed and arrested him for armed robbery of Catalano. R. 51, 58, 60, 104. A search of the bedroom, the second room and the kitchen was conducted in an effort to find an automatic revolver,[10] but the search was unsuccessful in this respect, R. 61, and the police were unable to find any evidence

[10]This search was conducted prior to this Court's 1969 decision in *Chimel v. California*, 395 U.S. 752.

during this search which could be used by the prosecution during the trial of this case. R. 106-107.[11]

Appellant was taken to police headquarters and charged with several armed robberies. R. 63. Three days later, on January 23, 1968, Eugene Frischertz, route salesman for Coca-Cola Bottling Company, picked Appellant out of a lineup and identified Appellant as the man who had robbed him on December 26, 1967. R. 66-68. Appellant was represented by counsel at this time. R. 49-51.

It is Appellant's contention herein that his arrest without warrant was unconstitutional, that his detention following arrest was unlawful, that the lineup identification of him which was made by Frischertz during that detention was illegally obtained, and that therefore his conviction should be reversed.

As a practical matter it is doubtful whether the police officers in the present proceeding had time to obtain an arrest warrant. Catalano's identification of Frank Johnson as one of the men who had robbed him probably took place on January 19, the day after the police received the confidential tip involving Appellant in the robberies of truck drivers. Johnson was arrested at six-thirty on the following morning, January 20, 1968. It takes at best three or four hours, and often a couple of days, for police officers to draw up an affidavit setting out reasonable cause for arrest and to submit the

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[11]**The officers picked up "a little syringe and a spoon that was used with narcotics" which were in plain view on the mantel piece. R. 61-62.**

application for the warrant to a Criminal District Court Judge for the Parish of Orleans for study and approval.

The State of Louisiana respectfully contends that no arrest warrant was necessary and that the officers in this case were justified in relying on the statutory authority to arrest without warrant which has been conferred on them by Articles 213, 216 and 224 of the Louisiana Code of Criminal Procedure, and that because reasonable, or probable, cause to make the warrantless arrest existed herein there was no violation of the Fourth Amendment

Initially Louisiana directs this Court's attention to the fact that historically the home has never been a sanctuary against arrest, for the reason that "the liberty or privilege of a house doth not hold against the King." *Semayne's Case*, 5 Coke 91, 77 Eng. Rep. 194, 197 (K. B. 1604); see Perkins, The Law of Arrest, 25 Iowa L. Rev. 201, 244 (1940). Thus it has long been settled that society's right to arrest one who breaks its laws takes precedence over the common law rule that a man's house is his castle.

The general warrants (or writs of assistance as they were known in the American Colonies), abhorrence of which furnished the basis for the Fourth Amendment's prohibition against unreasonable searches and seizures, were in violation of the existing common law rules in that they were not required to be based on evidence giving rise to a reasonable presumption that a crime was being or had been committed, but were, on the contrary, blanket written authorizations given by the English King to his officials (and good for the

life of the sovereign in the case of the writ of assistance) which permitted the officer holding the general warrant or writ of assistance to arrest whomever he wanted, according to his personal whim and regardless of probable cause. See *Henry v. United States*, 361 U.S. 98, 100-101 (1959); Leagre, The Fourth Amendment and the Law of Arrest, 54 J. Crim. L.C. & P.S. 393, 396-397 (1963). Therefore, state statutes such as Article 213 of the Louisiana Code of Criminal Procedure which permit an arrest without warrant when the peace officer has reasonable, or probable, cause to believe that a crime is being or has been committed cannot be likened to writs of assistance or general warrants in the respectful view of Louisiana.

Moreover several practical aspects of the arrest procedure must be kept in mind. For one thing, the fact of mobility which justifies the search of an automobile without a warrant, see *Carroll v. United States*, 267 U.S. 132 (1925), is also present in the arrest of a person. In this respect an arrest differs radically from a search for inanimate property. Additionally, reasonable police practice often requires that an arrest be postponed, either until sufficient evidence is obtained to furnish reasonable grounds for the arrest, as in the case at bar, or in order not to alert other participants in the crime, yet in many cases, even after considerable delay, quick action by the police in making the arrest may be necessary. Also, often by the time probable cause to arrest a man has developed he is on the verge of flight. These considerations persuaded Congress to give the FBI the authority to arrest without a warrant without any showing of probability of flight. See *Chimel v. California*, 395 U.S. 752, 778-780 (1969)

(dissenting opinion of White, J.): Leagre, The Fourth Amendment and the Law of Arrest, 54 J. Crim. L.C. & P.S. 391, 405 (1963).

For lower federal court decisions holding that an arrest warrant is unnecessary even if there is time to secure one, see *United States v. Montos*, 421 F.2d 215, 225 (5th Cir. 1970); *Odom v. United States*, 403 F.2d 45 (6th Cir. 1968); *Bailey v. United States*, 261 F.2d 870 (5th Cir. 1958).

Further, if a warrant must be obtained for an arrest, which can only be made if there is probable cause to believe that a crime has been committed, must a warrant also be secured every time the police detain a person for investigation? As this Court knows, the police may detain a man for several hours for investigative purposes on something less than probable cause for arrest. In determining whether such a detention is justifiable two factors must be considered: 1) whether the circumstances justify an investigation; and 2) whether the extent of the detention is appropriate under the existing facts. See Wolbrette, Detention For Questioning in Louisiana, 39 Tul. L. Rev. 69 (1964); Fisher, Laws of Arrest, Situations Distinguished From Arrest, pp. 58-98 (1967); Comment, Stop and Frisk, 63 Nw. U.L.Rev. 837, 845-848 (1969); compare *Terry v. Ohio*, 392 U.S. 1 (1968).

*Davis v. Mississippi*, 394 U.S. 721 (1969), relied on by Appellant herein, presents a totally different fact situation from the one existing in the present case. There the only evidence the police had following a rape were finger and palm prints on the window through

which the rapist had entered the victim's home and the victim's vague description of her assailant as "a Negro youth." During the ten day period following the commission of the crime the police took at least 24 black youths, among them Davis, to headquarters, where they were questioned briefly, fingerprinted and released. Thereafter the police arrested Davis, although no reasonable grounds to believe that he had committed the crime existed, and two days after the arrest, while in jail, Davis was again fingerprinted. Later, after more evidence had been found, Davis was tried for the rape and convicted, partly on the strength of the fingerprint evidence. This Court set aside the conviction on the ground that Davis' fingerprints were invalidly obtained on both occasions and thus were inadmissible in evidence during Davis' trial. Also in *Bynum v. United States*, 262 F.2d 465 (D.C. Cir. 1958), cited and quoted from with approval by this Court in its opinion in *Davis*, the arresting officer had no reasonable ground to believe that Clayborne Bynum had committed a felony.

In the case presently before the Court, on the other hand, the arresting officers had reasonable ground to believe that Appellant had recently robbed Marion Catalano, a truck driver for Brown's Velvet Dairy Products, and it was for this reason that Appellant was arrested. R. 55-58.

Louisiana also respectfully contends that there is a marked difference between the finger and palm prints which were taken from Davis and subsequently introduced as evidence at his trial and the lineup identification of Appellant by Frischertz in the instant case.

The fingerprints obtained from Davis during his illegal detention constituted concrete, tangible physical evidence which was introduced by the prosecution during the trial. In the present proceeding the prosecution's whole case was based on the in-court identification of Appellant by the Coca-Cola Company truck driver whom Appellant robbed, Eugene Frischertz. R. 66-93. This in-court identification of Appellant by Frischertz must be held to have a source independent of the pretrial lineup in view of the fact that Frischertz was robbed at about 3:30 in the afternoon and was able to get a good, close look at the robber, who was wearing no face mask or other type of disguise, and whose physical appearance during the commission of the crime made a strong impression on Frischertz. See *United States v. Wade,* 388 U.S. 218, 241-242 (1967). Thus, although the pretrial lineup was referred to by the witness several times, particularly during cross-examination and was described in detail, and a picture of the lineup was introduced, the evidence on which Appellant was convicted by the jury was clearly Frischertz' strong identification of Appellant during the trial, based on the fact, as described by Frischertz, that on the day of the robbery the witness had seen Appellant approaching in his rear view mirror on the side of his truck, and that when he got to the door of the truck Appellant held a gun on Frischertz and the driver's two helpers and said, "Give me all your money." R. 67, 78, 81-82. Thus, the lineup identification here at issue was not an independent piece of evidence offered by the prosecution to prove the guilt of the accused, as in *Davis,* but was only offered to corroborate the strong in-court identification of Appellant made by Frischertz.

Furthermore, Appellant in the instant proceedings, unlike Davis, did not during his trial object to testimony concerning the pretrial lineup in which he had been identified by Frischertz, and raised this issue *for the first time* when his case was appealed to the Supreme Court of Louisiana. Thus the trial judge was given no opportunity to rule on the admissibility of testimony concerning the pretrial lineup, and under Louisiana law waived any objection thereto. See Arts. 841-845, 920 La. Code Crim. Proc.[12]

For the foregoing reasons the State of Louisiana is of the respectful belief that the warrantless arrest of Appellant herein was valid and constitutional even though the police officers may have had sufficient time to swear out a warrant of arrest. Alternatively, it is Louisiana's position that introduction of evidence of the pretrial lineup identification of Appellant by Frischertz during the trial was at most harmless error in view of the strong in-court identification of Appellant by Frischertz and the fact that this in-court identification had a source independent of the pretrial lineup.

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[12]**The accused filed a Motion to Suppress prior to trial and a hearing was held thereon, during which it developed that no evidence material to this case was seized by the police in their search of Appellant's house following his arrest, and for this reason the trial judge decided that the Motion to Suppress was moot. R. 14-18, 26-29. At the time the prosecution offered the lineup photograph, S-1, in evidence defense counsel objected only on the ground that it had not been properly identified. R. 99-100. In the Louisiana Supreme Court the State contended that Appellant had waived the question of the admissibility of his lineup identification by failing to timely object; however, that court decided the question on the merits. See *State v. Johnson*, 255 La. 314, 325-332; 230 So.2d 825 (1970).**

## CONCLUSION

The State of Louisiana respectfully requests that this Honorable Court affirm the judgment of the Supreme Court of Louisiana in this case.

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## JOHNSON *v.* LOUISIANA

APPEAL FROM THE SUPREME COURT OF LOUISIANA

No. 69–5035. Argued March 1, 1971—Reargued January 10, 1972—Decided May 22, 1972

A warrantless arrest for robbery was made of appellant at his home on the basis of identification from photographs, and he was committed by a magistrate. Thereafter he appeared in a lineup, at which he was represented by counsel, and was identified by the victim of another robbery. He was tried for the latter offense before a 12-man jury and convicted by a nine-to-three verdict, as authorized by Louisiana law in cases where the crime is necessarily punishable at hard labor. Other state law provisions require unanimity for five-man jury trials of offenses in which the punishment may be at hard labor and for 12-man jury trials of capital cases. The Louisiana Supreme Court affirmed the conviction, rejecting appellant's challenge to the jury-trial provisions as violative of due process and equal protection and his claim that the lineup identification was a forbidden fruit of an invasion of appellant's Fourth Amendment rights. Appellant conceded that under *Duncan* v. *Louisiana*, 391 U. S. 145, which was decided after his trial began and which has no retroactive effect, the Sixth Amendment does not apply to his case. *Held:*

1. The provisions of Louisiana law requiring less-than-unanimous jury verdicts in criminal cases do not violate the Due Process Clause for failure to satisfy the reasonable-doubt standard. Pp. 2–7.

(a) The mere fact that three jurors vote to acquit does not mean that the nine who vote to convict have ignored their instructions concerning proof beyond a reasonable doubt or that they do not honestly believe that guilt has been thus proved. Pp. 4–5.

(b) Want of jury unanimity does not alone establish reasonable doubt. P. 6.

2. The Louisiana legal scheme providing for unanimous verdicts in capital and five-man jury cases but for less-than-unanimous

verdicts otherwise, and which varies the difficulty of proving guilt with the gravity of the offense, was designed to serve the rational purposes of "facilitat[ing], expedit[ing], and reduc[ing] expense in the administration of justice," and does not constitute an invidious classification violative of equal protection. Pp. 7–8.

3. Since no evidence constituting the fruit of an illegal arrest was used at appellant's trial, the validity of his arrest is not at issue and the lineup was conducted, not by the "exploitation" of the arrest, but under the authority of appellant's commitment by the magistrate, which purged the lineup procedure of any "primary taint." P. 9.

255 La. 314, 230 So. 2d 825, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BLACKMUN and POWELL, JJ., filed concurring opinions. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined. STEWART, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 69–5035

Frank Johnson, Appellant,
*v.*
Louisiana.

On Appeal From the Supreme Court of Louisiana.

[May 22, 1972]

MR. JUSTICE WHITE delivered the opinion of the Court.

Under both the Louisiana Constitution and Code of Criminal Procedure, criminal cases in which the punishment is necessarily at hard labor are tried to a jury of 12, and the vote of nine jurors is sufficient to return either a guilty or not guilty verdict.[1] The principal question

[1] La. Const. Art. VII, § 41, provides:

"Section 41. The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service. All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict."

La. Code Crim. Proc. Art. 782 provides:

"Cases in which the punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which the punishment is necessarily at hard labor shall be tried by a jury composed of twelve jurors, nine of whom must concur to render a verdict. Cases in which the punishment may be

in this case is whether these provisions allowing less than unanimous verdicts in certain cases are valid under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

I

Appellant Johnson was arrested at his home on January 20, 1968. There was no arrest warrant, but the victim of an armed robbery had identified Johnson from photographs as having committed the crime. He was then identified at a lineup, at which he had counsel, by the victim of still another robbery. The latter crime is involved in this case. Johnson pleaded not guilty, was tried on May 14, 1968, by a 12-man jury and was convicted by a nine-to-three verdict. His due process and equal protection challenges to the Louisiana constitutional and statutory provisions were rejected by the Louisiana courts, 255 La. 314, 230 So. 2d 825 (1970), and he appealed here. We noted probable jurisdiction. 400 U. S. 900 (1970). Conceding that under *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), the Sixth Amendment is not applicable to his case, see *DeStefano* v. *Woods*, 392 U. S. 631 (1968), appellant presses his equal protection and due process claims, together with a Fourth Amendment claim also rejected by the Louisiana Supreme Court. We affirm.

II

Appellant argues that in order to give substance to the reasonable doubt standard which the State, by virtue of the Due Process Clause of the Fourteenth Amendment, must satisfy in criminal cases, see *In re Winship*, 397 U. S. 358, 363–364 (1970), that clause must be construed to require a unanimous jury verdict in all

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imprisonment at hard labor, shall be tried by a jury composed of five jurors, all of whom must concur to render a verdict. Except as provided in Article 780, trial by jury may not be waived."

criminal cases. In so contending, appellant does not challenge the instructions in this case. Concededly, the jurors were told to convict only if convinced of guilt beyond a reasonable doubt. Nor is there any claim that, if the verdict in this case had been unanimous, the evidence would have been insufficient to support it. Appellant focuses instead on the fact that less than all jurors voted to convict and argues that, because three voted to acquit, the reasonable doubt standard has not been satisfied and his conviction is therefore infirm.

We note at the outset that this Court has never held jury unanimity to be a requisite of due process of law. Indeed, the Court has more than once expressly said that "[i]n criminal cases due process of law is not denied by a state law . . . which dispenses with the necessity of a jury of twelve, or unanimity in the verdict." *Jordan* v. *Massachusetts*, 225 U. S. 167, 176 (1912) (dictum). Accord, *Maxwell* v. *Dow*, 176 U. S. 581, 602, 605 (1900) (dictum). These statements, moreover, coexisted with cases indicating that proof of guilt beyond a reasonable doubt is implicit in constitutions recognizing "the fundamental principles that are deemed essential for the protection of life and liberty." *Davis* v. *United States*, 160 U. S. 469, 488 (1895). See also *Leland* v. *Oregon*, 343 U. S. 790, 802–803 (1952) (dissenting opinion); *Brinegar* v. *United States*, 338 U. S. 160, 174 (1949); *Coffin* v. *United States*, 156 U. S. 432, 453–460 (1895).[2]

[2] *Coffin*, *supra*, contains a lengthy discussion on the requirement of proof beyond a reasonable doubt and other similar standards of proof in ancient Hebrew, Greek, and Roman law, as well as in the common law of England. This discussion suggests that the Court of the late 19th century would have held the States bound by the reasonable doubt standard under the Due Process Clause of the Fourteenth Amendment on the assumption that the standard was essential to a civilized system of criminal procedure. See generally *Duncan* v. *Louisiana*, *supra*, at 149–150 n. 14.

Entirely apart from these cases, however, it is our view that the fact of three dissenting votes to acquit raises no question of constitutional substance about either the integrity or the accuracy of the majority verdict of guilt. Appellant's contrary argument breaks down into two parts, each of which we shall consider separately: first, that nine individual jurors will be unable to vote conscientiously in favor of guilt beyond a reasonable doubt when three of their colleagues are arguing for acquittal, and second, that guilt cannot be said to have been proved beyond a reasonable doubt when one or more of a jury's members at the conclusion of deliberation still possess such a doubt. Neither argument is persuasive.

Numerous cases have defined a reasonable doubt as one "based on reason which arises from the evidence or lack of evidence." *United States* v. *Johnson,* 343 F. 2d 5, 6 n. 1 (CA2 1965). Accord, *e. g., Bishop* v. *United States,* 107 F. 2d 297, 303 (CADC 1939); *United States* v. *Schneiderman,* 106 F. Supp 906, 927 (SD Cal. 1952); *United States* v. *Haupt,* 47 F. Supp. 836, 840 (ND Ill.), rev'd on other grounds, 136 F. 2d 661 (CA7 1943). In *Winship, supra,* the Court recognized this evidentiary standard as " 'impress[ing] on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.' " 397 U. S., at 364 (citation omitted). In considering the first branch of appellant's argument, we can find no basis for holding that the nine jurors who voted for his conviction failed to follow their instructions concerning the need for proof beyond such a doubt or that the vote of any one of the nine failed to reflect an honest belief that guilt had been so proved. Appellant, in effect, asks us to assume that, when minority jurors express sincere doubts about guilt, their fellow jurors will nevertheless ignore them and vote to convict even if deliberation has not been exhausted and minority jurors have grounds for acquittal which, if pursued, might per-

suade members of the majority to acquit. But the mere fact that three jurors voted to acquit does not in itself demonstrate that, had the nine jurors of the majority attended further to reason and the evidence, all or one of them would have developed a reasonable doubt about guilt. We have no grounds for believing that majority jurors, aware of their responsibility and power over the liberty of the defendant, would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion and render a verdict. On the contrary it is far more likely that a juror presenting reasoned argument in favor of acquittal would either have his arguments answered or would carry enough other jurors with him to prevent conviction. A majority will cease discussion and outvote a minority only after reasoned discussion has ceased to have persuasive effect or to serve any other purpose—when a minority, that is, continues to insist upon acquittal without having persuasive reasons in support of its position. At that juncture there is no basis for denigrating the vote of so large a majority of the jury or for refusing to accept their decision as being, at least in their minds, beyond a reasonable doubt. Indeed, at this point, a "dissenting juror should consider whether his doubt was a reasonable one . . . [when it made] no impression upon the minds of so many men, equally honest, equally intelligent with himself." *Allen* v. *United States*, 164 U. S. 492, 501 (1896). Appellant offers no evidence that majority jurors simply ignore the reasonable doubts of their colleagues or otherwise act irresponsibly in casting their votes in favor of conviction, and before we alter our own longstanding perceptions about jury behavior and overturn a considered legislative judgment that unanimity is not essential to reasoned jury verdicts, we must have some basis for doing so other than unsupported assumptions.

We conclude, therefore, that, as to the nine jurors who voted to convict, the State satisfied its burden of proving guilt beyond any reasonable doubt. The remaining question under the Due Process Clause is whether the vote of three jurors for acquittal can be said to impeach the verdict of the other nine and to demonstrate that guilt was not in fact proved beyond such doubt. We hold that it cannot.

Of course, the State's proof could perhaps be regarded as more certain if it had convinced all 12 jurors instead of only nine; it would have been even more compelling if it had been required to convince and had, in fact, convinced 24 or 36 jurors. But the fact remains that nine jurors—a substantial majority of the jury—were convinced by the evidence. In our view disagreement of three jurors does not alone establish reasonable doubt, particularly when such a heavy majority of the jury, after having considered the dissenters' views, remains convinced of guilt. That rational men disagree is not in itself equivalent to a failure of proof by the State, nor does it indicate infidelity to the reasonable doubt standard. Jury verdicts finding guilt beyond a reasonable doubt are regularly sustained even though the evidence was such that the jury would have been justified in having a reasonable doubt, see *United States* v. *Quarles*, 387 F. 2d 551, 554 (CA4 1967); *Bell* v. *United States*, 185 F. 2d 302, 310 (CA4 1950); even though the trial judge might not have reached the same conclusion as the jury, see *Takahashi* v. *United States*, 143 F. 2d 118, 122 (CA9 1944); and even though appellate judges are closely divided on the issue whether there was sufficient evidence to support a conviction. See *United States* v. *Johnson*, 433 F. 2d 1160, 1166 (CADC 1970); *United States* v. *Manuel-Baca*, 421 F. 2d 781, 783 (CA9 1970). That want of jury unanimity is not to be equated with the existence of a reasonable doubt emerges even more clearly from the fact that, when

a jury in a federal court, which operates under the unanimity rule and is instructed to acquit a defendant if it has a reasonable doubt about his guilt, see *Holt* v. *United States*, 218 U. S. 245, 253 (1910); *Agnew* v. *United States*, 165 U. S. 36, 51 (1897); W. Mathes & E. Devitt, Federal Jury Practice and Instructions § 8.01 (1965), cannot agree unanimously upon a verdict, the defendant is not acquitted, but is merely given a new trial. *Downum* v. *United States*, 372 U. S. 734, 736 (1963); *Dreyer* v. *Illinois*, 187 U. S. 71, 85–86 (1902); *United States* v. *Perez*, 9 Wheat. 579, 580 (1824). If the doubt of a minority of jurors indicates the existence of a reasonable doubt it would appear that a defendant should receive a directed verdict of acquittal rather than a retrial. We conclude, therefore, that verdicts rendered by nine out of 12 jurors are not automatically invalidated by the disagreement of the dissenting three. Appellant was not deprived of due process of law.

## III

Appellant also attacks as violative of the Equal Protection Clause the provisions of Louisiana law requiring unanimous verdicts in capital and five-man jury cases, but permitting less-than-unanimous verdicts in cases such as his. We conclude, however, that the Louisiana statutory scheme serves a rational purpose and is not subject to constitutional challenge.

In order to "facilitate, expedite, and reduce expense in the administration of justice," *State* v. *Lewis*, 129 La. 800, 804, 56 So. 893, 894 (1911), Louisiana has permitted less serious crimes to be tried by five jurors with unanimous verdicts, more serious crimes have required the assent of nine of 12 jurors, and for the most serious crimes a unanimous verdict of 12 jurors is stipulated. In appellant's case, nine jurors rather than five or 12 were re-

quired for a verdict. We discern nothing invidious in this classification. We have held that the States are free under the Federal Constitution to try defendants with juries of less than 12 men. *Williams* v. *Florida*, 399 U. S. 78 (1970). Three jurors here voted to acquit, but from what we have earlier said, this does not demonstrate that appellant was convicted on a lower standard of proof. To obtain a conviction in any of the categories under Louisiana law, the State must prove guilt beyond reasonable doubt, but the number of jurors who must be so convinced increases with the seriousness of the crime and the severity of the punishment that may be imposed. We perceive nothing unconstitutional or invidiously discriminatory, however, in a State's insisting that its burden of proof be carried with more jurors where more serious crimes or more severe punishments are at issue.

Appellant nevertheless insists that dispensing with unanimity in his case disadvantaged him as compared with those who commit less serious or capital crimes. With respect to the latter, he is correct; the State does make conviction more difficult by requiring the assent of all 12 jurors. Appellant might well have been ultimately acquitted had he committed a capital offense. But as we have indicated, this does not constitute a denial of equal protection of the law; the State may treat capital offenders differently without violating the constitutional rights of those charged with lesser crimes. As to the crimes triable by a five-man jury, if appellant's position is that it is easier to convince nine of 12 jurors than to convince all of five, he is simply challenging the judgment of the Louisiana Legislature. That body obviously intended to vary the difficulty of proving guilt with the gravity of the offense and the severity of the punishment. We remain unconvinced by anything

appellant has presented that this legislative judgment was defective in any constitutional sense.

## IV

Appellant also urges that his nighttime arrest without a warrant was unlawful in the absence of a valid excuse for failing to obtain a warrant and further that his subsequent lineup identification was a forbidden fruit of the claimed invasion of his Fourth Amendment rights. The validity of Johnson's arrest, however, is beside the point here, for it is clear that no evidence which might properly be characterized as the fruit of an illegal entry and arrest was used against him at his trial. Prior to the lineup, at which Johnson was represented by counsel, he was brought before a committing magistrate to advise him of his rights and set bail. At the time of the lineup, the detention of the appellant was under the authority of this commitment. Consequently, the lineup was conducted not by "exploitation" of the challenged arrest but "by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun* v. *United States,* 371 U. S. 471, 488 (1962).

The judgment of the Supreme Court of Louisiana is therefore

*Affirmed.*

# SUPREME COURT OF THE UNITED STATES

Nos. 69–5035 & 69–5046

| | |
|---|---|
| Frank Johnson, Appellant,<br>69–5035 *v.*<br>Louisiana. | On Appeal From the Supreme Court of Louisiana. |
| Robert Apodaca, Harry Morgan Cooper, Jr., and James Arnold Madden, Petitioners,<br>69–5046 *v.*<br>Oregon. | On Writ of Certiorari to the Court of Appeals of Oregon. |

[May 22, 1972]

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion and judgment in each of these cases. I add only the comment, which should be obvious and should not need saying, that in so doing I do not imply that I regard a State's split verdict system as a wise one. My vote means only that I cannot conclude that the system is constitutionally offensive. Were I a legislator, I would disfavor it as a matter of policy. Our task here, however, is not to pursue and strike down what happens to impress us as undesirable legislative policy.

I do not hesitate to say, either, that a system employing a 7–5 standard, rather than a 9–3 or 75% minimum, would afford me great difficulty. As MR. JUSTICE WHITE points out in *Johnson, ante,* p. 6, "a substantial majority of the jury are to be convinced. That is all that is before us in each of these cases.

# SUPREME COURT OF THE UNITED STATES

Nos. 69–5035 & 69–5046

| | |
|---|---|
| Frank Johnson, Appellant,<br>69–5035 *v.*<br>Louisiana. | On Appeal From the Supreme Court of Louisiana. |
| Robert Apodaca, Harry Morgan Cooper, Jr., and James Arnold Madden, Petitioners,<br>69–5046 *v.*<br>Oregon. | On Writ of Certiorari to the Court of Appeals of Oregon. |

[May 22, 1972]

MR. JUSTICE POWELL, concurring in No. 69–5035 and concurring in the judgment in No. 69–5046.

I concur in the judgment of the Court that convictions based on less than unanimous jury verdicts in these cases did not deprive criminal defendants of due process of law under the Fourteenth Amendment. As my reasons for reaching this conclusion in the Oregon case differ from those expressed in the plurality opinion by MR. JUSTICE WHITE, I will state my views separately.

## I

### 69–5035

*Duncan* v. *Louisiana*, 391 U. S. 145 (1968), stands for the proposition that criminal defendants in state courts are entitled to trial by jury.[1] The source of that right is the Due Process Clause of the Fourteenth Amendment. Due process, as consistently interpreted by this Court, commands that citizens subjected to criminal process in state courts be accorded those rights which are

[1] That right, of course, is reserved for those crimes which may be deemed "serious." See *id.*, at 159–162; *Bloom* v. *Illinois*, 391 U. S. 194 (1968); *Baldwin* v. *New York*, 399 U. S. 66 (1970).

fundamental to a fair trial in the context of our "American scheme of justice." *Id.*, at 149. The right of an accused person to trial by a jury of his peers was a cherished element of the English common law long before the American Revolution. In this country, prior to *Duncan*, every State had adopted a criminal adjudicatory process calling for the extensive use of petit juries. *Id.*, at 150 n. 14; *Turner* v. *Louisiana*, 379 U. S. 466, 471 n. 9 (1965). Because it assures the interposition of an impartial assessment of one's peers between the defendant and his accusers, the right to trial by jury deservedly ranks as a fundamental of our system of jurisprudence. With this principle of due process, I am in full accord.

In *DeStefano* v. *Woods*, 392 U. S. 631 (1968), an Oregon petitioner sought to raise the question, left open in *Duncan*, whether the right to jury trial in a state court also contemplates the right to a unanimous verdict.[2] Because the Court concluded that *Duncan* was not to have retroactive applicability, it found it unnecessary to decide whether the Fourteenth Amendment requires unanimity. The trial in the case before the Court at that time occurred several years prior to May 20, 1968, the date of decision in *Duncan*. In the Louisiana case now before us, the petitioner also was convicted by a less than unanimous verdict before *Duncan* was decided. Accordingly, I read *DeStefano* as foreclosing consideration in this case of the question whether jury trial as guaranteed by the Due Process Clause contemplates a corollary requirement that its judgment be unanimous.

Indeed, in *Johnson* v. *Louisiana*, appellant concedes that the nonretroactivity of *Duncan* prevents him from raising his due process argument in the classic "fundamental fairness" language adopted there. Instead he

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[2] This contention was raised in *Carcerano* v. *Gladden*, No. 941, which was consolidated and disposed of along with the *DeStefano* opinion.

claims that he is deprived of due process because a conviction in which only nine of 12 jurors joined is not one premised on a finding of guilt beyond a reasonable doubt, held to be a requisite element of due process in *In re Winship,* 397 U. S. 358, 364 (1970). For the reasons stated in the majority opinion, I do not agree that Louisiana's less than unanimous verdict rule undercuts the applicable standard of proof in criminal prosecutions in that State.

Appellant also asks this Court to find a violation of the equal protection clause in Louisiana's constitutional and statutory provisions establishing the contours of the jury trial right in that State. The challenged provisions divide those accused of crimes into three categories depending on the severity of the possible punishment: those charged with offenses for which the punishment might be at hard labor are entitled to a five-juror, unanimous verdict; those charged with offenses for which the punishment will necessarily be at hard labor are entitled to a verdict in which nine of 12 jurors must concur; and those charged with capital offenses are entitled to a 12-juror, unanimous verdict. La. Const. Art. VII, § 41; La. Code Crim. Proc. Art. 782. Such distinctions between classes of defendants do not constitute invidious discrimination against any one of the classes unless the state's classification can be said to lack a reasonable or rational basis. We have been shown no reason to question the rationality of Louisiana's tri-level system. I, therefore, join the Court's opinion in *Johnson* v. *Louisiana* affirming the decision below.[3]

[3] In addition to the jury trial issues in this case, I also join Part IV of the Court's opinion insofar as it concludes that the lineup identification was not the fruit of the prior warrantless arrest. *Wong Sun* v. *United States,* 371 U. S. 471 (1963). Under the circumstances of this case, I find it unnecessary to reach the question whether appellant's warrantless arrest was constitutionally invalid.

II

69–5046

In the Oregon case decided today, *Apodaca et al.* v. *Oregon,* the trials occurred after *Duncan* was decided. The question left unanswered in *Duncan* and *DeStefano* is therefore squarely presented. I concur in the plurality opinion in this case insofar as it concludes that a defendant in a state court may constitutionally be convicted by less than a unanimous verdict, but I am not in accord with a major premise upon which that judgment is based. Its premise is that the concept of jury trial, as applicable to the States under the Fourteenth Amendment, must be identical in every detail to the concept required in federal courts by the Sixth Amendment.[4] I do not think that all of the elements of jury trial within the meaning of the Sixth Amendment are necessarily embodied in or incorporated into the Due Process Clause of the Fourteenth Amendment. As Mr. Justice Fortas, concurring in *Duncan* v. *Louisiana,* 391 U. S., at 213, said:

> "Neither logic nor history nor the intent of the draftsmen of the Fourteenth Amendment can possibly be said to require that the Sixth Amendment or its jury trial provision be applied to the States together with the total gloss that the Court's decisions have supplied."

In an unbroken line of cases reaching back into the late 1800's, the Justices of this Court have recognized, virtually without dissent, that unanimity is one of the indispensable features of *federal* jury trial. *Andres* v. *United States,* 333 U. S. 740, 748–749 (1948); *Patton* v. *United States,* 281 U. S. 276, 288–290 (1930); *Hawaii* v. *Mankichi,* 190 U. S. 197, 211–212 (1903) (see also Mr.

[4] Jury trial in federal cases is also assured by Art. III, § 2, of the Constitution: "The trial of all Crimes . . . shall be by Jury."

Justice Harlan's dissenting opinion); *Maxwell* v. *Dow*, 176 U. S. 581, 586 (1900) (see also Mr. Justice Harlan's dissenting opinion); *Thompson* v. *Utah*, 170 U. S. 343, 355 (1898).[5] In these cases, the Court has presumed that unanimous verdicts are essential in federal jury trials, not because unanimity is necessarily fundamental to the function performed by the jury, but because that result is mandated by history.[6] The reasoning which

[5] See also MR. JUSTICE WHITE'S opinion for the Court in *Swain* v. *Alabama*, 380 U. S. 202, 211 (1965), stating, in dictum, that "Alabama adheres to the common-law system of trial by an impartial jury of 12 men who must unanimously agree on a verdict, *the system followed in the federal courts by virtue of the Sixth Amendment*." (Emphasis supplied.)

The same result has been attained with respect to the right to jury trial in civil cases under the Seventh Amendment. See *American Publishing Co.* v. *Fisher*, 166 U. S. 464, 467–468 (1897); *Springville* v. *Thomas*, 166 U. S. 707 (1897).

[6] The process of determining the content of the Sixth Amendment right to jury trial has long been one of careful evaluation of, and strict adherence to the limitations on, that right as it was known in criminal trials at common law. See *Williams* v. *Florida*, 399 U. S. 78, 117, 122–129 (1970) (Mr. Justice Harlan's separate opinion).

A recent example of that process of constitutional adjudication may be found in Part II of the Court's opinion in *Duncan* v. *Louisiana*, 391 U. S., at 159–162, in which "petty" offenses were excluded from the rule requiring jury trial because such "offenses were tried without juries both in England and in the Colonies." The Court found "no substantial evidence that the Framers intended to depart from this established common-law practice." *Id.*, at 160. To the same effect, see Mr. Justice Harlan's dissent in *Baldwin* v. *New York* (appearing in *Williams* v. *Florida*, 399 U. S., at 119–121).

Also representative of this historical approach to the Sixth Amendment are the exhaustive majority and dissenting opinions in *Sparf* v. *United States*, 156 U. S. 51 (1895), in which the Court ultimately concluded that federal criminal juries were empowered only to decide questions of "fact." Rather than attempting to determine whether the fact-law distinction was desirable or whether it might be essential to the function performed by juries, the decision was premised on

runs throughout this Court's Sixth Amendment precedents is that, in amending the Constitution to guarantee the right to jury trial, the Framers desired to preserve the jury safeguard as it was known to them at common law.[7] At the time the Bill of Rights was adopted, unanimity had long been established as one of the attributes of a jury conviction at common law.[8] It therefore seems to me, in accord both with history and precedent, that the Sixth Amendment requires a unanimous jury verdict to convict in a federal criminal trial.

But it is the Fourteenth Amendment, rather than the Sixth, which imposes upon the States the requirement that they provide jury trials to those accused of serious crimes. This Court has said, in cases decided when the intendment of that Amendment was not as clouded by the passage of time, that due process does not require that the States apply the federal jury trial right with all its gloss. In *Maxwell* v. *Dow*, 176 U. S., at 605, Mr.

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the conclusion that English and Colonial juries had no right to decide questions of law.

The same historical approach accounts for the numerous Supreme Court opinions (see text accompanying n. 5), finding unanimity to be one of the attributes subsumed under the term "jury trial." No reason, other than the conference committee's revision of the House draft of the Sixth Amendment, has been offered to justify departure from this Court's prior precedents. The admitted ambiguity of that piece of legislative history is not sufficient, in my view, to override the unambiguous history of the common law right. *Williams* v. *Florida*, 399 U. S., at 123 n. 9.

[7] See, *e. g.*, R. Perry, Sources of Our Liberties, 270, 281–282, 288, 429 (1959); 3 J. Story, Commentaries on the Constitution of the United States 652–653 (1st ed. 1833).

[8] See, *e. g.*, 4 W. Blackstone, Commentaries on the Laws of England *376 (Cooley ed. 1899); W. Forsyth, History of Trial By Jury 238–258 (1852); M. Hale, Analysis of the Law of England 119 (1716).

Justice Peckham, speaking for eight of the nine members of the Court, so stated:

> "[W]hen providing in their constitution and legislation for the manner in which civil or criminal actions shall be tried, it is in entire conformity with the character of the Federal Government that [the States] should have the right to decide for themselves what shall be the form and character of the procedure in such trials, . . . whether there shall be a jury of twelve or a lesser number, and whether the verdict must be unanimous or not. . . ."

Again, in *Jordan* v. *Massachusetts*, 225 U. S. 167, 176 (1912), the Court concluded that "[i]n criminal cases due process of law is not denied by a state law which dispenses with . . . the necessity of a jury of twelve, or unanimity in the verdict."

It is true, of course, that the *Maxwell* and *Jordan* Courts went further and concluded that the States might dispense with jury trial altogether. That conclusion, grounded on a more limited view of due process than has been accepted by this Court in recent years,[9] was rejected by the Court in *Duncan*. But I find nothing in the

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[9] I agree with MR. JUSTICE WHITE'S analysis in *Duncan* that the departure from earlier decisions was, in large measure, a product of a change in focus in the Court's approach to due process. No longer are questions regarding the constitutionality of particular criminal procedures resolved by focusing alone on the element in question and ascertaining whether a system of criminal justice might be imagined in which a fair trail could be afforded in the absence of that particular element. Rather, the focus is, as it should be, on the fundamentality of that element viewed in the context of the basic Anglo-American jurisprudential system common to the States. *Duncan* v. *Louisiana*, 391 U. S., at 149–150 n. 14. That approach to due process readily accounts both for the conclusion that jury trial *is* fundamental and that unanimity *is not*. See Part III, *infra*.

constitutional principle upon which *Duncan* is based, or in other precedents, which requires repudiation of the views expressed in *Maxwell* and *Jordan* with respect to the size of a jury and the unanimity of its verdict. Mr. Justice Fortas, concurring in *Duncan*, commented on the distinction between the requirements of the Sixth Amendment and those of the Due Process Clause and suggested the appropriate framework for analysis of the issue in this case.

> "I see no reason whatever . . . to assume that our decision today should require us to impose federal requirements such as unanimous verdicts or a jury of 12 upon the States. We may well conclude that these and other features of federal jury practice are by no means fundamental—that they are not essential to due process of law—and that they are not obligatory on the States." *Duncan* v. *Louisiana*, 391 U. S., at 213.

The question, therefore, which should be addressed in this case is whether unanimity is in fact so fundamental to the essentials of jury trial that this particular requirement of the Sixth Amendment is necessarily binding on the States under the Due Process Clause of the Fourteenth Amendment. An affirmative answer, ignoring the strong views previously expressed to the contrary by this Court in *Maxwell* and *Jordan*, would give unwarranted and unwise scope to the incorporation doctrine as it applies to the due process right of state criminal defendants to trial by jury.

The importance which our system attaches to trial by jury derives from the special confidence we repose in a "body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement." *Williams* v. *Florida*, 399 U. S. 78, 87 (1970). It is this safeguarding function, preferring the commonsense judgment of a jury as a bulwark "against the corrupt or overzealous

prosecutor and against the compliant, biased, or eccentric judge," [10] which lies at the core of our dedication to the principles of jury determination of guilt or innocence.[11] This is the fundamental of jury trial which brings it within the mandate of due process. It seems to me that this fundamental is adequately preserved by the jury verdict provision of the Oregon Constitution. There is no reason to believe, on the basis of experience in Oregon or elsewhere, that a unanimous decision of 12 jurors is more likely to serve the high purpose of jury trial, or is entitled to greater respect in the community, than the same decision joined in by 10 members of a jury of 12. The standard of due process assured by the Oregon Constitution provides a sufficient guarantee that the government will not be permitted to impose its judgment on an accused without first meeting the full burden of its prosecutorial duty.[12]

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[10] *Duncan* v. *Louisiana*, 391 U. S., at 156. See also *Baldwin* v. *New York*, 399 U. S. 66, 72 (1970).

[11] Indeed, so strongly felt was the jury's role as the protector of "innocence against the consequences of the partiality and undue bias of judges in favor of the prosecution," that, at an earlier point in this country's history, some of the States deemed juries the final arbiters of all questions arising in criminal prosecutions, whether factual or legal. To allow judges to determine the law was considered by some States to pose too great a risk of judicial oppression, favoring the State above the accused. See, *e. g.*, *Vermont* v. *Croteau*, 23 Vt. 14, 21 (1849); Howe, Juries as Judges of Criminal Law, 52 Harv. L. Rev. 582 (1939). That historical preference for jury decisionmaking is still reflected in the criminal procedures of two States. Ind. Const., Art. I, § 19, Md. Const., Art. XV, § 5. See *Brady* v. *Maryland*, 373 U. S. 83 (1963); *Wyley* v. *Warden*, 372 F. 2d 742, 746 (CA4), cert denied, 389 U. S. 863 (1967); *Beavers* v. *Indiana*, 236 Ind. 549, 141 N. E. 2d 118 (1957).

[12] The available empirical research indicates that the jury trial protection is not substantially affected by less than unanimous verdict requirements. Kalven and Zeisel, in their frequently cited study of American juries (The American Jury (Phoenix ed. 1971)), note that where unanimity is demanded 5.6% of the cases result in

Moreover, in holding that the Fourteenth Amendment has incorporated "jot-for-jot and case-for-case" [13] every element of the Sixth Amendment, the Court derogates principles of federalism which are basic to our system. In the name of uniform application of high standards of due process, the Court has embarked upon a course of constitutional interpretation which deprives the States of freedom to experiment with adjudicatory processes different from the federal model. At the same time, the Court's understandable unwillingness to impose requirements which it finds unnecessarily rigid (*e. g.*, *Williams* v. *Florida*, 399 U. S. 78), has culminated in the dilution of federal rights which were, until these decisions, never seriously questioned. The doubly undesirable consequence of this reasoning process, labeled by Mr. Justice Harlan as "constitutional schizophrenia," *id.*, at 136, may well be detrimental both to the state and federal criminal justice systems. Although it is perhaps late in the day for an expression of my views, I would have been in accord with the opinions in similar cases by THE CHIEF JUSTICE and Justices Harlan, STEWART, and Fortas [14] that, at least in defining the elements of the

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hung juries. *Id.*, at 461. Where unanimity is not required, available statistics indicate that juries will still be hung in over 3% of the cases. Thus, it may be estimated roughly that Oregon's practice may result in verdicts in some 2.5% more of the cases—cases in which no verdict would be returned if unanimity were demanded. Given the large number of causes to which this percentage disparity might be attributed, and given the possibility of conviction on retrial, it is impossible to conclude that this percentage represents convictions obtained under standards offensive to due process.

[13] *Duncan* v. *Louisiana*, *supra*, at 181 (Mr. Justice Harlan's dissenting opinion).

[14] *Id.*, at 173–183 (Mr. Justice Harlan, with whom MR. JUSTICE STEWART joined, dissenting); *Bloom* v. *Illinois*, 391 U. S. 194, 211 (1968) (Mr. Justice Fortas, concurring); *Baldwin* v. *New York*, 399 U. S. 66, 76–77 (THE CHIEF JUSTICE, dissenting); *Williams* v. *Florida*, 399 U. S., at 117, 148 (1970) (separate concurring opinions

right to jury trial, there is no sound basis for interpreting the Fourteenth Amendment to require blind adherence by the States to all details of the federal Sixth Amendment standards.[15]

While the Civil War Amendments altered substantially the balance of federalism, it strains credulity to believe that they were intended to deprive the States of all freedom to experiment with variations in jury trial procedure. In an age in which empirical study is increasingly relied upon as a foundation for decision-making, one of the more obvious merits of our federal system is the opportunity it affords each State, if its people so choose, to become a "laboratory" and to experiment with a range of trial and precedural alternatives. Although the need for the innovations that grow out of diversity has always been great, imagination unimpeded by unwarranted demands for national uniformity is of special importance at a time when se ious doubt exists as to the adequacy of our criminal justice system. The same diversity of local legislative responsiveness which marked the development of economic and social reforms in this country,[16] if not barred by an unduly restrictive application of the Due Process Clause, might well lead to valuable innovations with respect to determining—fairly

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by Mr. Justice Harlan and MR. JUSTICE STEWART). Cf. MR. JUSTICE DOUGLAS' concurring opinion in *Alexander* v. *Louisiana*, 40 U. S. L. W. 4365, 4369 n. 4 (1972).

[15] My unwillingness to accept the "incorporationist" notion that jury trial must be applied with total uniformity does not require that I take issue with every precedent of this Court applying various criminal procedural rights to the States with the same force that they are applied in federal courts. See Mr. Justice Fortas' opinion in *Duncan* v. *Louisiana*, 391 U. S., at 214.

[16] See Mr. Justice Brandeis' oft quoted dissent in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 280, 309–311 (1932), in which he details the stultifying potential of the substantive due process doctrine.

and more expeditiously—the guilt or innocence of the accused.

Viewing the unanimity controversy as one requiring a fresh look at the question of what is fundamental in jury trial, I see no constitutional infirmity in the provision adopted by the people of Oregon. It is the product of a constitutional amendment, approved by a vote of the people in the State, and appears to be patterned on a provision of the American Law Institute's Code of Criminal Procedure.[17] A similar decision has been echoed more recently in England where the unanimity requirement was abandoned by statutory enactment.[18] Less than unanimous verdict provisions also have been viewed with approval by the American Bar Association's Criminal Justice Project.[19] Those who have studied the jury mechanism and recommended deviation from the historic rule of unanimity have found a number of considerations to be significant. Removal of the unanimity requirment could well minimize the potential for hung juries occasioned either by bribery or juror irrationality. Furthermore, the rule that juries must speak with a single voice often leads, not to full agreement among the 12 but to agreement by none and compromise by all, despite the frequent absence of a rational basis for such compromise.[20] Quite apart from whether Justices sitting on

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[17] ALI, Code of Criminal Procedure § 335 (1931).

[18] Criminal Justice Act § 13 (1967) (Great Britain).

[19] ABA, Project on Minimum Standards for Criminal Justice, Standards Relating to Trial By Jury § 1.1 (Approved Draft, 1968) (see also commentary, pp. 25–28).

[20] See, *e. g.*, Kalven & Zeisel, The American Jury—Notes for an English Controversy, 48 Chi. B. Rec. 195 (1967); Samuels, Criminal Justice Act, 31 Mod. L. Rev. 16, 24–27 (1968); Comment, Waiver of Jury Unanimity—Some Doubts About Reasonable Doubt, 21 U. Chi. L. Rev. 438, 444–445 (1954); Comment, Should Jury Verdicts Be Unanimous in Criminal Cases?, 47 Ore. L. Rev. 417 (1968).

this Court would have deemed advisable the adoption of any particular less than unanimous jury provision, I think that considerations of this kind reflect a legitimate basis for experimentation and deviation from the federal blueprint.[21]

III

Petitioners in *Apodaca et al.* v. *Oregon,* in addition to their primary contention that unanimity is a requirement of state jury trials because the Fourteenth Amendment "incorporates" the Sixth, also assert that Oregon's constitutional provision offends the federal constitutional guarantee against the systematic exclusion of any group within the citizenry from participating in the criminal trial process. While the systematic exclusion of identifiable minorities from jury service has long been recognized as a violation of the Equal Protection Clause (see, *e. g., Whitus* v. *Georgia,* 385 U. S. 545 (1967); *Strauder* v. *West Virginia,* 100 U. S. 303 (1880)), in more recent years the Court has held that criminal defendants are entitled, as a matter of due process, to a jury drawn from a representative cross-section of the community. This is an essential element of a fair and impartial jury trial. See *Williams* v. *Florida,* 399 U. S., at 100; *Alexander* v. *Louisiana,* 40 U. S. L. W. 4365, 4368 (1972) (MR. JUSTICE DOUGLAS' concurring opinion). Petitioners contend that less than unanimous jury verdict provisions undercut that right by implicitly permitting

[21] See *Oregon* v. *Gann,* 254 Ore. 549, 463 P. 2d 570 (1969).

Approval of Oregon's 10–2 requirement does not compel acceptance of all other majority-verdict alternatives. Due process and its mandate of basic fairness often requires the drawing of difficult lines. See *Francis* v. *Resweber,* 329 U. S. 459, 466, 471 (1947) (Mr. Justice Frankfurter, concurring). Full recognition of the function performed by jury trials, coupled with due respect for the presumptive validity of state laws based on rational considerations such as those mentioned above, will assist in finding the required balance when the question is presented in a different context.

in the juryroom that which is prohibited in the jury venire selection process—the exclusion of minority group viewpoints. They argue that unless unanimity is required even of a properly drawn jury, the result—whether conviction or acquittal—may be the unjust product of racism, bigotry or an emotionally inflamed trial.

Such fears materialize only when the jury's majority, responding to these extraneous pressures, ignores the evidence and the instructions of the court as well as the rational arguments of the minority. The risk, however, that a jury in a particular case will fail to meet its high responsibility is inherent in any system which commits decisions of guilt or innocence to untrained laymen drawn at random from the community. In part, at least, the majority-verdict rule must rely on the same principle which underlies our historic dedication to jury trial: both systems are premised on the conviction that each juror will faithfully perform his assigned duty. MR. JUSTICE DOUGLAS' dissent today appears to rest on the contrary assumption that the members of the jury comprising the majority have no *duty* to consider the minority's viewpoint in the course of deliberation. Characterizing the jury's consideration of minority views as mere "polite and academic conversation," or "courtesy dialogue," he concludes that a jury is under no obligation in Oregon to deliberate at all if 10 jurors vote together at the outset. *Post,* at ——. No such power freely to shut off competing views is implied in the record in this case and it is contrary to basic principles of jury participation in the criminal process. While there may be, of course, reasonable differences of opinion as to the merit of the speculative concerns expressed by these petitioners and reflected in the dissenting opinion, I find nothing in Oregon's experience to justify the apprehension that juries not bound by the unanimity rule will be more likely to ignore their historic responsibility.

Moreover, the States need not rely on the presumption

of regularity in a vacuum since each has at its disposal protective devices to diminish significantly the prospect of jury irresponsibility. Even before the jury is sworn substantial protection against the selection of a representative but wilfully irresponsible jury is assured by the wide availability of peremptory challenges and challenges for cause.[22] The likelihood of miscarriage of justice is further diminished by the judges' use of full jury instructions, detailing the applicable burdens of proof, informing the jurors of their duty to weigh the views of fellow jurors,[23] and reminding them of the solemn responsibility imposed by their oaths. Trial judges also retain the power to direct acquittals in cases in which the evidence of guilt is lacking, or to set aside verdicts once rendered when the evidence is insufficient to support a conviction. Furthermore, in cases in which public emotion runs high or pretrial publicity threatens a fair trial, judges possess broad power to grant changes of venue,[24] and to impose restrictions on the extent of press coverage.[25]

In light of such protections it is unlikely that the Oregon "ten-of-twelve" rule will account for an increase in the number of cases in which injustice will be occasioned by a biased or prejudiced jury. It may be wise to recall MR. JUSTICE WHITE'S admonition in *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 102 (1963), that the Constitution "protects against real dangers, not remote and speculative possibilities." Since I do not view Oregon's less than unanimous jury verdict requirement as violative of the due process guarantee of the Fourteenth Amendment, I concur in the Court's affirmance of these convictions.

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[22] See, *e. g.*, *Swain* v. *Alabama*, 380 U. S. 202, 209–222 (1968).

[23] *Allen* v. *United States*, 164 U. S. 492 (1896).

[24] See, *e. g.*, *Irvin* v. *Doud*, 366 U. S. 717 (1961).

[25] See, *e. g.*, *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966); *Estes* v *Texas*, 381 U. S. 532 (1965).

# SUPREME COURT OF THE UNITED STATES

Nos. 69–5035 & 69–5046

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| Frank Johnson, Appellant,<br>69–5035 *v.*<br>Louisiana. | On Appeal From the Supreme Court of Louisiana. |
| Robert Apodaca, Harry Morgan Cooper, Jr., and James Arnold Madden, Petitioners,<br>69–5046 *v.*<br>Oregon. | On Writ of Certiorari to the Court of Appeals of Oregon. |

[May 22, 1972]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

Appellant in the Louisiana case and petitioners in the Oregon case were convicted by juries that were less than unanimous. This procedure is authorized by both the Louisiana and Oregon Constitutions. Their claim, rejected by the majority, is that this procedure is a violation of their federal constitutional rights. With due respect to the majority, I dissent from this radical departure from American traditions.

I

The Constitution does not mention unanimous juries. Neither does it mention the presumption of innocence nor does it say that guilt must be proven beyond a reasonable doubt in all criminal cases. Yet it is almost inconceivable that anyone would have questioned whether proof beyond a reasonable doubt was in fact the constitutional standard. And, indeed, when such a case finally arose we had little difficulty disposing of the issue. *In re Winship,* 397 U. S. 358, 364.

The Court, speaking through MR. JUSTICE BRENNAN, stated that the

> "use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.
>
> "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Ibid.*

I had similarly assumed that there was no dispute that the Federal Constitution required a unanimous jury in all criminal cases. After all, it has long been explicit constitutional doctrine that the Seventh Amendment civil jury must be unanimous. See *American Publishing Co.* v. *Fisher*, 166 U. S. 464, where the Court said that "unanimity was one of the peculiar and essential features of trial by jury at the common law. No authorities are needed to sustain this proposition." *Id.*, at 468. Like proof beyond a reasonable doubt, the issue of unanimous juries in criminal cases simply never arose. Yet in cases dealing with juries it had always been assumed that a unanimous jury was required.[1] See *Maxwell* v.

[1] See also 2 J. Story, Commentaries on the Constitution 559 n. 2 (5th ed. 1891): "A trial by jury is generally understood to mean *ex vi termini*, a trial by a jury of *twelve* men, impartially selected, who

*Dow,* 176 U. S. 581, 586; *Patton* v. *United States,* 281 U. S. 276, 288; *Andres* v. *United States,* 333 U. S. 740, 748. Today the bases of those cases are discarded and two centuries of American history are shunted aside.[2]

The result of today's decision is anomalous: though unanimous jury decisions are not required in state trials, they are constitutionally required in federal prosecutions. How can that be possible when both decisions stem from the Sixth Amendment?

We held unanimously in 1948 that the Bill of Rights requires a unanimous jury verdict:

> "Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt and

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must *unanimously* concur in the guilt of the accused before a legal conviction can be had. Any law, therefore, dispensing with any of these requisites, may be considered unconstitutional." Last Term we held a jury of six was sufficient, *Williams* v. *Florida,* 399 U. S. 88, but we noted that neither evidence nor theory suggested 12 was more favorable to the accused than six. The same cannot be said for unanimity and impartial selection of jurors. See pp. 9–15, *infra.*

Story's Commentaries cite no statutory authority for the requirement of unanimity in a criminal jury. That is because such authority has never been thought necessary. The unanimous jury has been so embedded in our legal history that no one would question its constitutional position and thus there was never any need to codify it. Indeed, no criminal case dealing with a unanimous jury has ever been decided by this Court before today, largely because of this unquestioned constitutional assumption. A similar assumption had, of course, been made with respect to the Seventh Amendment civil jury, but that issue did reach the Court. And the Court had no difficulty at all in holding a unanimous jury was a constitutional requirement. *American Publishing Co.* v. *Fisher,* 166 U. S. 464.

[2] Of course, the unanimous jury's origin is long before the American Revolution. The first recorded case where there is a requirement of unanimity is *Anonymous Case,* 41 *Lib. Assisarum* 11 (1367), reprinted in English in R. Pound and T. F. Plunkett, Readings on the History and System of the Common Law 155–156 (1927).

> punishment—which are left to the jury. A verdict embodies in a single finding the conclusions by the jury upon all the questions submitted to it." *Andres* v. *United States,* 333 U. S. 740, 748.

After today's decision, a man's property may only be taken away by a unanimous jury vote, yet he can be stripped of his liberty by a lesser standard. How can that result be squared with the law of the land as expressed in the settled and traditional requirements of procedural due process?

Rule 31 (a) of the Federal Rules of Criminal Procedure states, "The verdict shall be unanimous." That Rule was made by this Court with the concurrence of Congress pursuant to 18 U. S. C. § 3771. After today a unanimous verdict will be required in a federal prosecution but not in the state prosecution. Yet the sources of the right in each case are the Sixth and Fourteenth Amendments. I fail to see how with reason we can maintain those inconsistent dual positions.

There have, of course, been advocates of the view that the duties imposed on the States by reason of the Bill of Rights operating through the Fourteenth Amendment are a watered-down version of those guarantees. But we held to the contrary in *Malloy* v. *Hogan,* 378 U. S. 1, 10–11:

> "We have held that the guarantees of the First Amendment, *Gitlow* v. *New York, supra; Cantwell* v. *Connecticut,* 310 U. S. 296; *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U. S. 293, the prohibition of unreasonable searches and seizures of the Fourth Amendment, *Ker* v. *California,* 374 U. S. 23, and the right to counsel guaranteed by the Sixth Amendment, *Gideon* v. *Wainwright, supra,* are all to be enforced against the States under the Fourteenth Amendment according to the same standards that

> protect those personal rights against federal encroachment. In the coerced confession cases, involving the policies of the privilege itself, there has been no suggestion that a confession might be considered coerced if used in a federal but not a state tribunal. The Court thus has rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'"

*Malloy*, of course, not only applied the Self-Incrimination Clause to the States but also stands for the proposition, as mentioned, that "the same standards must determine whether an accused's silence in either a federal or state proceeding is justified." *Id.*, 11. See also *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 79. The equation of federal and state standards for the Self-Incrimination Clause was expressly reaffirmed in *Griffin* v. *California*, 380 U. S. 609, 615; and in *Miranda* v. *Arizona*, 384 U. S. 436, 464.

Similarly, when the Confrontation Clause was finally made obligatory on the States, Justice Black for the majority was careful to observe that its guarantee "like the right against compelled self-incrimination 'is to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" *Pointer* v. *Texas*, 380 U. S. 400, 406. Cf. *Dutton* v. *Evans*, 400 U. S. 74, 81.

Likewise, when we applied the Double Jeopardy Clause against the States JUSTICE MARSHALL wrote for the Court that "Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' *Duncan* v. *Louisiana* . . . the same constitutional standards apply against both the State and Federal Governments." *Benton* v. *Maryland*, 395

U. S. 784, 795. And, the doctrine of coextensive coverage was followed in holding the Speedy Trial Clause applicable to the States. *Klopfer* v. *North Carolina*, 386 U. S. 213, 222.

And, in *Duncan* v. *Louisiana*, 391 U. S. 145, 158 n. 30, in holding the jury trial guarantee binding in state trials, we noted that its prohibitions were to be identical against both the Federal and State Governments. See also 391 U. S., at 213 (concurring opinion).

Only once has this Court diverged from the doctrine of coextensive coverage of guarantees brought within the Fourteenth Amendment, and that aberration was later rectified. In *Wolf* v. *Colorado*, 338 U. S. 25, it was held that the Fourth Amendment ban against unreasonable and warrantless searches was enforceable against the States but the Court declined to incorporate the Fourth Amendment exclusionary rule of *Weeks* v. *United States*, 232 U. S. 383. Happily, however, that gap was partially closed in *Elkins* v. *United States*, 364 U. S. 206, and then completely bridged in *Mapp* v. *Ohio*, 367 U. S. 643. In *Mapp* we observed that "This Court has not hesitated to enforce as strictly against the State as it does against the Federal Government the rights of free speech and of a free press, the rights to notice and to a fair, public trial. . . ." We concluded that "the same rule" should apply where the Fourth Amendment was concerned. And, later, we made clear that "the standard for obtaining a search warrant is . . . 'the same under the Fourth and Fourteenth Amendments,'" *Aguilar* v. *Texas*, 378 U. S. 108, 110; and that the "standard of reasonableness is the same under the Fourth and Fourteenth Amendments." *Ker* v. *California*, 374 U. S. 23, 33.

It is said, however, that the Sixth Amendment, as applied to the States by reason of the Fourteenth, does not mean what it does in federal proceedings, that it has a "due process" gloss on it, and that that gloss gives

the States power to experiment with the explicit or implied guarantees in the Bill of Rights.

Mr. Justice Holmes in *Truax* v. *Corrigan,* 257 U. S. 312, 344, and Mr. Justice Brandeis in *New State Ice* v. *Liebmann,* 285 U. S. 262, 311, thought that the States should be allowed to improvise remedies for social and economic ills. But in that area there are not many "thou shalt nots" in the Constitution and Bill of Rights concerning property rights. The most conspicuous is the Just Compensation Clause of the Fifth Amendment. It has been held applicable in full vigor to the States by reason of the Fourteenth Amendment. *Chicago, B&Q R. Co.* v. *Chicago,* 166 U. S. 226.

Does today's decision mean that States may apply a "watered down" version of the Just Compensation Clause? Or is today's decision limited to a paring down of civil rights protected by the Bill of Rights and up until now as fully applicable to the States as to the Federal Government?

These civil rights—whether they concern speech, searches and seizures, self-incrimination, criminal prosecutions, bail, or cruel and unusual punishments extend of course to everyone, but in cold reality touch mostly the lower castes in our society. I refer of course to the Blacks, the Chicanos, the one-mule farmers, the agricultural workers, the off-beat students, the victims of the ghetto. Are we giving the States the power to experiment in diluting their civil rights? It has long been thought that the Thou Shalt Nots in the Constitution and Bill of Rights protect everyone against governmental intrusion or overreaching. The idea has been obnoxious that there are some who can be relegated to second-class citizenship. But if we construe the Bill of Rights and the Fourteenth Amendment to permit States to "experiment" with the basic rights of people, we open a veritable Pandora's box. For hate and prejudice are

versatile forces that can degrade the constitutional scheme.[3]

That, however, is only one of my concerns when we make the Bill of Rights, as applied to the States, a "watered down" version of what that charter guarantees. My chief concern is one often expressed by the late Justice Black who was alarmed at the prospect of nine men appointed for life sitting as a super-legislative body to determine whether government has gone too far. The balancing was done when the Constitution and Bill of Rights were written and adopted. For this Court to determine, say, whether one person but not another is entitled to free speech is a power never granted it. But that is the ultimate reach of a decision that lets the States, subject to our veto, to experiment with rights guaranteed by the Bill of Rights.

I would construe the Sixth Amendment, when applicable to the States, precisely as I would when applied to the Federal Government.

## II

The plurality approves a procedure which diminishes the reliability of jury. First, it eliminates the circumstances in which a minority of jurors (a) could have

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[3] What was said of *Mapp*'s impact on federalism bears repeating here:

"Mapp . . . established no assumption by this Court of supervisory authority over state courts . . . and, consequently, it implied no total obliteration of state laws relating to arrests and searches in favor of federal law. *Mapp* sounded no death knell for our federalism; rather, it echoed the sentiment of *Elkins* v. *United States* [, *supra,*] that 'a healthy federalism depends upon the avoidance of needless conflict between state and federal courts' by itself urging that '[f]ederal-state cooperation . . . will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches." *Ker* v. *California*, 374 U. S. 23, 31.

rationally persuaded the entire jury to acquit, or (b) while unable to persuade the majority to acquit, nonetheless could have convinced them to convict only on a lesser-included offense. Second, it permits prosecutors in Oregon and Louisiana to enjoy a conviction-acquittal ratio substantially greater than that ordinarily returned by unanimous juries.

The dimunition of verdict reliability flows from the fact that nonunanimous juries need not debate and deliberate as fully as must unanimous juries. As soon as the requisite majority is attained, further consideration is not required either by Oregon or by Louisiana even though the dissident jurors might, if given the chance, be able to convince the majority. Such persuasion does in fact occasionally occur in States where the unanimous requirement applies: "In roughly one case in ten, the minority eventually succeeds in reversing an initial majority, and these may be cases of special importance."[4] One explanation for this phenomenon is that because jurors are often not permitted to take notes and because they have imperfect memories, the forensic process of forcing jurors to defend their conflicting recollections and conclusions flushes out many nuances which otherwise would go overlooked. This collective effort to piece together the puzzle of historical truth, however, is cut short as soon as the requisite majority is reached in Oregon and Louisiana. Indeed, if a necessary majority is immediately obtained, then no deliberation at all is required in these States. (There is a suggestion that this may have happened in the 10–2 verdict rendered in only 41 minutes in Apodaca's case.) To be sure, in jurisdictions other than these two States, initial majorities normally prevail in the end, but about a tenth

[4] Kalven & Zeisel, The American Jury 490 (1966). See also The American Jury: Notes For an English Controversy, 48 Chi. Bar Rec. 195 (1967).

of the time the rough and tumble of the juryroom operates to reverse completely their preliminary perception of guilt or innocence. The Court now extracts from the juryroom this automatic check against hasty fact-finding by relieving jurors of the duty to hear out fully the dissenters.

It is said that there is no evidence that majority jurors will refuse to listen to dissenters whose votes are unneeded for conviction. Yet human experience teaches that polite and academic conversation is no substitute for the earnest and robust argument necessary to reach unanimity. As mentioned earlier, in Apodaca's case, whatever courtesy dialogue transpired could not have lasted more than 41 minutes. I fail to understand why the Court should lift from the States the burden of justifying so radical a departure from an accepted and applauded tradition and instead demand that these defendants document with empirical evidence what has always been thought to be too obvious for further study.

To be sure in *Williams* v. *Florida*, 399 U. S. 88, we held that a State could provide a jury less than 12 in number in criminal trial. We said "What few experiments have occurred—usually in the civil area—indicate that there is no discernible difference between the results reached by the two different-sized juries. In short, neither currently available evidence nor theory suggests that the 12-man jury is necessarily more advantageous to the defendant than a jury composed of fewer members." *Id.*, at 101–102.

That rationale of *Williams* can have no application here. *Williams* requires that the change be neither more nor less advantageous to either the State or the defendant. It is said that such a showing is satisfied here since a 3:9 (Louisiana) or 2:10 (Oregon) verdict will result in acquittal. Yet experience shows that the less than unanimous jury overwhelmingly favors the States.

Moreover, even where an initial majority wins the dissent over to its side, the ultimate result in unanimous jury States may nonetheless reflect the reservations of uncertain jurors. I refer to many compromise verdicts on lesser-included offenses and lesser sentences. Thus, even though a minority may not be forceful enough to carry the day, their doubts may nonetheless cause a majority to exercise caution. Obviously, however, in Oregon and Louisiana, dissident jurors will not have the opportunity through full deliberation to temper the opposing faction's degree of certainty of guilt.

The new rule also has an impact on cases in which a unanimous jury would have neither voted to acquit nor to convict, but would have deadlocked. In unanimous jury States, this occurs about 5.6% of the time. Of these deadlocked juries, Kalven and Zeisel say that 56% contain either one, two, or three dissenters. In these latter cases, the majorities favor the prosecution 44% (of the 56%) but the defendant only 12% (of the 56%).[5] Thus, by eliminating these deadlocks, Louisiana wins 44 cases for every 12 that it loses, obtaining in this band

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[5] The American Jury, *supra*, at 460, n. 3.

Last Vote of Deadlocked Juries

| Vote for Conviction | Per Cent |
|---|---|
| 11:1 | 24 |
| 10:2 | 10 |
| 9:3 | 10 |
| 8:4 | 6 |
| 7:5 | 13 |
| 6:6 | 13 |
| 5:7 | 8 |
| 4:8 | 4 |
| 3:9 | 4 |
| 2:10 | 8 |
| 1:11 | – |
| | 100% |

Number of Juries in Sample—48.

of outcomes a substantially more favorable conviction ratio (3.67) than the unanimous jury ratio of slightly less than two guilty verdicts for every acquittal. H. Kalven & H. Zeisel, The American Jury 461, 488 (Table 155) (1966). By eliminating the one and two dissenting juror cases, Oregon does even better, gaining 4.25 convictions for every acquittal. While the statutes on their face deceptively appear to be neutral, the use of the nonunanimous jury stacks the truth-determining process against the accused. Thus, we take one step more away from the accusatorial system that has been our proud boast.

It is my belief that a unanimous jury is necessary if the great barricade known as proof beyond a reasonable doubt is to be maintained. This is not to equate proof beyond a reasonable doubt with the requirement of a unanimous jury. That would be analytically fallacious since a deadlocked jury does not bar, as double jeopardy, retrial for the same offense. See *Dreyer* v. *Illinois*, 187 U. S. 71. Nevertheless, one is necessary for a proper effectuation of the other. Compare *Mapp.* v. *Ohio*, 367 U. S. 643, with *Wolf* v. *Colorado*, 338 U. S. 25.

Suppose a jury begins with the substantial minority but then in the process of deliberation a sufficient number changes to reach the required 9:3 or 10:2 for a verdict. Is not there still a lingering doubt about that verdict? Is it not clear that the safeguard of unanimity operates in this context to make it far more likely that guilt is established beyond a reasonable doubt?

The late Learned Hand said that "as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death."[6] At the criminal level that dread multiplies. Any person faced with the awesome power of

[6] III Lectures on Legal Topics, Assoc. of Bar of the City of N. Y., p. 105 (1926).

government is in great jeopardy, even though innocent. Facts are always elusive and often two-faced. What may appear to one to imply guilt may carry no such overtones to another. Every criminal prosecution crosses treacherous ground, for guilt is common to all men. Yet the guilt of one may be irrelevant to the charge on which he is tried or indicate that if there is to be a penalty, it should be of an extremely light character.

The risk of loss of his liberty and the certainty that if found guilty he will be "stigmatized by the conviction" were factors we emphasized in *Winship* in sustaining the requirement that no man should be condemned where there is reasonable doubt about his guilt. 397 U. S., at 363–364.

We therefore have always held that in criminal cases we would err on the side of letting the guilty go free rather than sending the innocent to jail. We have required proof beyond a reasonable doubt as "concrete substance for the presumption of innocence." *Id.*, at 363.

That procedure has required a degree of patience on the part of the jurors, forcing them to deliberate in order to reach a unanimous verdict. Up until today the price has never seemed too high. Now a "law and order" judicial mood causes these barricades to be lowered.

The requirements of a unanimous jury verdict in criminal cases and proof beyond a reasonable doubt are so embedded in our constitutional law and touch so directly all the citizens and are such important barricades of liberty that if they are to be changed they should be introduced by constitutional amendment.

Today the Court approves a nine to three verdict. Would the Court relax the standard of reasonable doubt still further by resorting to eight to four verdicts or even a majority rule? Moreover, in light of today's holdings

and that of *Williams* v. *Florida,* in the future would it invalidate three to two or even two to one convictions?

Is the next step the elimination of the presumption of innocence? Mr. Justice Frankfurter, writing in dissent in *Leland* v. *Oregon,* 343 U. S. 790, 802–803, said:

> "It is not unthinkable that failure to bring the guilty to book for a heinous crime which deeply stirs popular sentiment may lead the legislature of a State, in one of those emotional storms which on occasion sweep over our people, to enact that thereafter an indictment for murder, following attempted rape, should be presumptive proof of guilt and cast upon the defendant the burden of proving beyond a reasonable doubt that he did not do the killing. Can there be any doubt that such a statute would go beyond the freedom of the States, under the Due Process Clause of the Fourteenth Amendment, to fashion their own penal codes and their own procedures for enforcing them? Why is that so? Because from the time that the law which we inherited has emerged from dark and barbaric times, the conception of justice which has dominated our criminal law has refused to put an accused at the hazard of punishment if he fails to remove every reasonable doubt of his innocence in the minds of jurors. It is the duty of the Government to establish his guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of the due process of law in the historic, procedural content of 'due process.' Accordingly there can be no doubt, I repeat, that a State cannot cast upon an accused the duty of establishing beyond a reasonable doubt that his was not the act which caused the death of another."

The vast restructuring of American law which is entailed in today's decisions is for political not for judicial action. Until the Constitution is rewritten, we have the present one to support and construe. It has served us well. We lifetime appointees, who sit here only by happenstance, are the last who should sit as a Committee of Revision on rights as basic as those involved in the present cases.

Proof beyond a reasonable doubt and unanimity of criminal verdicts and the presumption of innocence are basic features of the accusatorial system. What we do today is not in that tradition but more in the tradition of the inquisition. Until amendments are adopted setting new standards, I would let no man be fined or imprisoned in derogation of what up to today was indisputably the law of the land.

# SUPREME COURT OF THE UNITED STATES

Nos. 69–5035 AND 69–5046

| | |
|---|---|
| Frank Johnson, Appellant,<br>69–5035 *v.*<br>Louisiana. | On Appeal From the Supreme Court of Louisiana. |
| Robert Apodaca, Harry Morgan Cooper, Jr., and James Arnold Madden, Petitioners,<br>69–5046 *v.*<br>Oregon. | On Writ of Certiorari to the Court of Appeals of Oregon. |

[May 22, 1972]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

Readers of today's opinions may be understandably puzzled why convictions by 11–1 and 10–2 jury votes are affirmed in No. 69–5046, when a majority of the Court agrees that the Sixth Amendment requires a unanimous verdict in federal criminal jury trials, and a majority also agrees that the right to jury trial guaranteed by the Sixth Amendment is to be enforced against the States according to the same standards that protect that right against federal encroachment. The reason is that while my Brother POWELL agrees that a unanimous verdict is required in federal criminal trials, he does not agree that the Sixth Amendment right to a jury trial is to be applied in the same way to State and Federal Governments. In that circumstance, it is arguable that the affirmance of the convictions of Apodaca, Madden, and Cooper is not inconsistent with a view that today's decision in No. 69–5046 is a holding that only a unanimous verdict will afford the accused in a state criminal prose-

cution the jury trial guaranteed him by the Sixth Amendment. In any event, the affirmance must not obscure that the majority of the Court remains of the view that, as in the case of every specific of the Bill of Rights that extends to the States,* the Sixth Amendment's jury trial guarantee, however it is to be construed, has identical application against both State and Federal Governments.

I can add only a few words to the opinions of my Brothers DOUGLAS, STEWART, and MARSHALL, which I have joined. Emotions may run high at criminal trials. Although we can fairly demand that jurors be neutral until they have begun to hear evidence, it would surpass our power to command that they remain unmoved by the evidence that unfolds before them. What this means is that jurors will often enter the jury deliberations with strong opinions on the merits of the case. If at that time a sufficient majority is available to reach a verdict, those jurors in the majority will have nothing but their own common sense to restrain them from returning a verdict before they have fairly considered the positions of jurors who would reach a different conclusion. Even giving all reasonable leeway to legislative judgment in such matters, I think it simply ignores reality to imagine that most jurors in these circumstances would or even could fairly weigh the arguments opposing their position.

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*See, for example, First Amendment, *Gitlow* v. *New York*, 268 U. S. 652; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U. S. 293; Fourth Amendment, *Ker* v. *California*, 374 U. S. 23; Fifth Amendment privilege against self-incrimination, *Malloy* v. *Hogan*, 378 U. S. 1; Fifth Amendment Double Jeopardy Clause, *Benton* v. *Maryland*, 395 U. S. 784; Fifth Amendment Just Compensation Clause, *Chicago B. & O. Ry. Co.* v. *Chicago*, 166 U. S. 226; Sixth Amendment's Speedy Trial Clause, *Klopfer* v. *North Carolina*, 386 U. S. 213; Sixth Amendment's guarantee of jury trial, *Duncan* v. *Louisiana*, 391 U. S. 145; Sixth Amendment's Confrontation Clause, *Pointer* v. *Texas*, 380 U. S. 400.

It is in this context that we must view the constitutional requirement that all juries be drawn from an accurate cross section of the community. When verdicts must be unanimous, no member of the jury may be ignored by the others. When less than unanimity is sufficient, consideration of minority views may become nothing more than a matter of majority grace. In my opinion, the right of all groups in this Nation to participate in the criminal process means the right to have their voices heard. A unanimous verdict vindicates that right. Majority verdicts could destroy it.

# SUPREME COURT OF THE UNITED STATES

No. 69-5035

Frank Johnson, Appellant,
*v.*
Louisiana.

On Appeal From the Supreme Court of Louisiana.

[May 22, 1972]

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

This case was tried before the announcement of our decision in *Duncan* v. *Louisiana,* 391 U. S. 145. Therefore, unlike *Apodaca* v. *Oregon,* decided today, — U. S. —, the Sixth Amendment's guarantee of trial by jury is not applicable here. *DeStefano* v. *Woods,* 392 U. S. 631. But I think the Fourteenth Amendment alone clearly requires that if a State purports to accord the right of trial by jury in a criminal case, then only a unanimous jury can return a constitutionally valid verdict.

The guarantee against systematic discrimination in the selection of criminal court juries is a fundamental of the Fourteenth Amendment. That has been the insistent message of this Court in a line of decisions extending over nearly a century. *E. g., Carter* v. *Jury Comm'n,* 396 U. S. 320 (1970); *Whitus* v. *Georgia,* 385 U. S. 545 (1967); *Hernandez* v. *Texas,* 347 U. S. 475 (1954); *Patton* v. *Mississippi,* 332 U. S. 463 (1947); *Norris* v. *Alabama,* 294 U. S. 587 (1935); *Carter* v. *Texas,* 177 U. S. 442 (1900); *Strauder* v. *West Virginia,* 100 U. S. 303 (1880). The clear purpose of these decisions has been to ensure universal participation of the citizenry in the administration of criminal justice. Yet today's judgment approves the elimination of the one rule that can ensure that such participation will be meaningful—the rule requiring the assent of all jurors before a verdict of conviction or acquittal can be returned. Under today's judg-

ment, nine jurors can simply ignore the views of their fellow panel members of a different race or class.*

The constitutional guarantee of an impartial system of jury selection in a state criminal trial rests on the Due Process and Equal Protection Clauses of the Fourteenth Amendment. See, *e. g.*, *Whitus* v. *Georgia*, *supra*, at 549–550; *Carter* v. *Texas*, *supra*, at 447; *Strauder* v. *West Virginia*, *supra*, at 310. Only a jury so selected can assure both a fair criminal trial, see *Strauder* v. *West Virginia*, *supra*, at 308–309, and public confidence in its result, cf. *Witherspoon* v. *Illinois*, 391 U. S. 510, 519–520; *In re Winship*, 397 U. S. 358, 364. Today's decision grossly undermines those basic assurances. For only a unanimous jury so selected can serve to minimize the potential bigotry of those who might convict on inadequate evidence, or acquit when evidence of guilt was clear. See *Strauder* v. *West Virginia*, *supra*, at 309. And community confidence in the administration of criminal justice cannot but be corroded under a system in which a defendant who is conspicuously identified with a particular group can be acquitted or convicted by a jury split along group lines. The requirements of unanimity and impartial selection thus complement each other in ensuring the fair performance of the vital functions of a criminal court jury.

It does not denigrate the system of trial by jury to acknowledge that it is imperfect, nor does it ennoble that system to drape upon a jury majority the mantle of presumptive reasonableness in all circumstances. The Court has never before been so impervious to reality in this area. Its recognition of the serious risks

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*And, notwithstanding MR. JUSTICE BLACKMUN's disclaimer, there is nothing in the reasoning of the Court's opinion that would stop it from approving verdicts by 8–4 or even 7–5.

of jury misbehavior is a theme unifying a series of constitutional decisions that may be in jeopardy if today's facile presumption of regularity becomes the new point of departure. Why, if juries do not sometimes act out of passion and prejudice, does the Constitution require the availability of a change of venue? Cf. *Groppi* v. *Wisconsin*, 400 U. S. 505; *Irvin* v. *Dowd*, 366 U. S. 717; *Strauder* v. *West Virginia*, *supra*, at 309. Why, if juries do not sometimes act improperly, does the Constitution require protection from inflammatory press coverage and *ex parte* influence by court officers? Cf., *e. g.*, *Sheppard* v. *Maxwell*, 384 U. S. 333; *Parker* v. *Gladden*, 385 U. S. 363; *Turner* v. *Louisiana*, 379 U. S. 466. Why, if juries must be presumed to obey all instructions from the bench, does the Constitution require that certain information must not go to the jury no matter how strong a cautionary charge accompanies it? Cf., *e. g.*, *Bruton* v. *United States*, 391 U. S. 123; *Jackson* v. *Denno*, 378 U. S. 368. Why, indeed, should we insist that no man can be constitutionally convicted by a jury from which members of an identifiable group to which he belongs have been systematically excluded? Cf., *e. g.*, *Hernandez* v. *Texas*, 347 U. S. 475.

So deeply engrained is the law's tradition of refusal to engage in after-the-fact review of jury deliberations, however, that these and other safeguards provide no more than limited protection. The requirement that the verdict of the jury be unanimous, surely as important as these other constitutional requisites, preserves the jury's function in linking law with contemporary society. It provides the simple and effective method endorsed by centuries of experience and history to combat the injuries to the fair administration of justice that can be inflicted by community passion and prejudice.

I dissent.

# SUPREME COURT OF THE UNITED STATES

Nos. 69–5035 & 69–5046

| | |
|---|---|
| Frank Johnson, Appellant,<br>69–5035 *v.*<br>Louisiana. | On Appeal From the Supreme Court of Louisiana. |
| Robert Apodaca, Harry Morgan Cooper, Jr., and James Arnold Madden, Petitioners,<br>69–5046 *v.*<br>Oregon. | On Writ of Certiorari to the Court of Appeals of Oregon. |

[May 22, 1972]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Today the Court cuts the heart out of two of the most important and inseparable safeguards the Bill of Rights offers a criminal defendant: the right to submit his case to a jury, and the right to proof beyond a reasonable doubt. Together, these safeguards occupy a fundamental place in our constitutional scheme, protecting the individual defendant from the awesome power of the State. After today, the skeleton of these safeguards remains, but the Court strips them of life and of meaning. I cannot refrain from adding my protest to that of my Brothers DOUGLAS, BRENNAN, and STEWART, whom I join.

In *Apodaca* v. *Oregon*, the question is too frighteningly simple to bear much discussion. We are asked to decide what is the nature of the "jury" that is guaranteed by the Sixth Amendment. I would have thought that history provided the appropriate guide, and as MR. JUSTICE POWELL has demonstrated so convincingly, history compels the decision that unanimity is an essential

feature of that jury. But the majority has embarked on a "functional" analysis of the jury that allows it to strip away, one by one, virtually all the characteristic features of the jury as we know it. Two years ago, over my dissent, the Court discarded as an essential feature the traditional size of the jury. *Williams* v. *Florida*, 399 U. S. 78 (1970). Today the Court discards, at least in state trials, the traditional requirement of unanimity. It seems utterly and ominously clear that so long as the tribunal bears the label "jury," it will meet Sixth Amendment requirements as they are presently viewed by this Court. The Court seems to require only that jurors be laymen, drawn from the community without systematic exclusion of any group, who exercise common sense judgment.

More distressing still than the Court's treatment of the right to jury trial is the cavalier treatment the Court gives to proof beyond a reasonable doubt. The Court asserts that when a jury votes nine to three for conviction, the doubts of the three do not impeach the verdict of the nine. The argument seems to be that since, under *Williams*, nine jurors are enough to convict, the three dissenters are mere surplusage. But there is all the difference in the world between three jurors who aren't there, and three jurors who entertain doubts after hearing all the evidence. In the first case we can never know, and it is senseless to ask, whether the prosecutor might have persuaded additional jurors had they been present. But in the second case we know what has happened: the prosecutor has tried and failed to persuade those jurors of the defendant's guilt. In such circumstances, it does violence to language and to logic to say that the government has proved the defendant's guilt beyond a reasonable doubt.

It is said that this argument is fallacious because a deadlocked jury does not, under our law, bring about an

acquittal or bar a retrial. The argument seems to be that if the doubt of a dissenting juror were the "reasonable doubt" that constitutionally bars conviction, then it would necessarily result in an acquittal and bar retrial. But that argument rests on a complete *non sequitur*. The reasonable doubt rule, properly viewed, simply establishes that, as a prerequisite to obtaining a valid conviction, the prosecutor must overcome all of the jury's reasonable doubts; it does not, of itself, determine what shall happen if he fails to do so. That is a question to be answered with reference to a wholly different constitutional provision, the Fifth Amendment ban on double jeopardy, made applicable to the States through the Due Process Clause of the Fourteenth Amendment in *Benton* v. *Maryland,* 395 U. S. 784 (1969).

Under prevailing notions of double jeopardy, if a jury has tried and failed to reach a unanimous verdict, a new trial may be held. *United States* v. *Perez,* 22 U. S. (9 Wheat.) 579 (1824). The State is free, consistent with the ban on double jeopardy, to treat the verdict of a nonunanimous jury as a nullity rather than as an acquittal. On retrial, the prosecutor may be given the opportunity to make a stronger case if he can: new evidence may be available, old evidence may have disappeared, and even the same evidence may appear in a different light if, for example, the demeanor of witnesses is different. Because the second trial may vary substantially from the first, the doubts of the dissenting jurors at the first trial do not necessarily impeach the verdict of a new jury on retrial. But that conclusion is wholly consistent with the view that the doubts of dissenting jurors create a constitutional bar to conviction at the trial which produced those doubts. Until today, I had thought that was the law.

I respectfully reject the suggestion of my Brother POWELL that the doubts of minority jurors may be at-

tributable to "irrationality" against which some protection is needed. For if the jury has been selected properly, and every juror is a competent and rational person, then the "irrationality" that enters into the deliberation process is precisely the essence of the right to a jury trial. Each time this Court has approved a change in the familiar characteristics of the jury, we have reaffirmed the principle that its fundamental characteristic is its capacity to render a commen sense, laymen's judgment, as a representative body drawn from the community. To fence out a dissenting juror fences out a voice from the community, and undermines the principle on which our whole notion of the jury now rests. My dissenting Brothers have pointed to the danger, under a less-than-unanimous rule, of excluding from the process members of minority groups, whose participation we have elsewhere recognized as a constitutional requirement. It should be emphasized, however, that the fencing-out problem goes beyond the problem of identifiable minority groups. The juror whose dissenting voice is unheard may be a spokesman, not for any minority viewpoint, but simply for himself—and that, in my view, is enough. The doubts of a single juror are in my view evidence that the government has failed to carry its burden of proving guilt beyond a reasonable doubt. I dissent.